SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 508.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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a UNITED STATES OF AMERICA, *ss:*

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the courthouse, in the city of Richmond, on the first Tuesday in November, being the first day of the same month, in the year of our Lord one thousand nine hundred and ten.

Present: Hon. Nathan Goff, circuit judge; Hon. J. C. Pritchard, circuit judge; Hon. John C. Rose, district judge.

Among other were the following proceedings, to wit:

Appeal from the Circuit Court of the United States for the Western District of Virginia, at Lynchburg.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, deceased, appellant,
versus
THE UNITED STATES OF AMERICA, APPELLEE. } No. 889.

Be it remembered that heretofore, to wit, on the 4th day of February, 1909, the transcript of the record of the said Circuit Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows, to wit:

1 *Transcript of record.—Filed February 4, 1909.*

United States Circuit Court of Appeals, Fourth Circuit.

MARY C. LEARY, ADMINISTRATRIX, PLAINTIFF in error,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error. } In equity.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

At a Circuit Court of the United States for the Western District of Virginia, continued and held at Lynchburg, in and for said district, on Monday, July 20th, 1908.

Hon. Henry C. McDowell, district judge.

Among the proceedings had were the following, to wit:

BILL.

In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE ET AL. } In equity. Bill, etc.

To the honorable the judges of said court:

The United States of America brings this their bill of complaint against Benjamin D. Greene, a citizen of the State of Connecticut,

temporarily residing at the city of Quebec in the Dominion of Canada, against Luther Laflin Kellogg, a citizen of the State of New York, resident in the city of New York, and against the
2 Norfolk and Western Railway Company, a corporation organized and doing business under the laws of the State of Virginia, and having its principal place of business at Roanoke in said Western District of Virginia.

I.

CARTER'S DUTIES, POWERS, AND DISCRETIONS.

And thereupon your orators charge, aver, complain, and say that from about the year 1888 until the 20th day of July, 1897, continuously, the said Oberlin M. Carter was an officer of the United States Army in the Corps of Engineers, and as such engineer in local charge in the Southern Judicial District of Georgia, of what is usually called the "Savannah district" for the improvement by the United States of rivers and harbors, and as such officer he was engaged in and about the execution of such river and harbor improvements as were made in said Savannah district during said period; and as such officer in charge of said Savannah district he was vested with sundry powers, duties, and discretions during said period and amongst others:

With power, duty, and discretion in proposing from time to time to his superiors for adoption, projects for the improvement of the rivers and harbors in said Savannah district.

With power, duty, and discretion in proposing from time to time to his superiors for adoption, projects for the expenditure of moneys appropriated by Congress for the improvement of the rivers and harbors in said Savannah district.

With power, duty, and discretion in devising, drafting, and proposing from time to time to his superiors for adoption, specifications for contracts for such river and harbor improvements proposed to be made in said Savannah district.

With power, duty, and discretion in from time to time drafting and proposing to his superiors for adoption, forms of advertisements for giving notice to the public that competitive bids would be received by him for the construction of such proposed river and harbor works.

With power, duty, and discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids.

With power, duty, and discretion in proposing from time to time to his superiors for adoption, and causing to be fixed, and fixing for such contracts to be let, the time designated in the specifications within which the successful bidder would be required to commence work.

With power, duty, and discretion in giving out information in regard to such contracts to be let.

3 With power, duty, and discretion in from time to time receiving proposals for and recommending to his superiors the awarding of such contracts.

With power, duty, and discretion in approving or rejecting the bonds required to be given by such contractors.

With power, duty, and discretion in superintending the work being done by contractors under such contracts in said Savannah district; and in approving and accepting or rejecting material being put in and work done by such contractors in said Savannah district, according as the same was in accordance with the requirements of such contracts or not.

With power, duty, and discretion in from time to time approving modifications of such contracts and suggesting to his superiors the adoption of such modifications.

With power, duty, and discretion in from time to time approving or rejecting the accounts rendered to him by such contractors for material furnished and work done or claimed by such contractors to have been furnished or done by them under contracts let, according as such accounts should be fair and honest or false and fraudulent.

With power, duty, and discretion when in funds intrusted to him as disbursing officer in from time to time paying such contractors, or refusing to pay them, the amounts claimed by them to be due them for material furnished and work done under such contracts let, according as such claims were fair and honest or false and fraudulent.

II.

THE SCHEME DEVISED TO DEFRAUD.

That on or about the year 1891, the said Oberlin M. Carter and one Benjamin D. Greene, one John F. Gaynor, one William T. Gaynor, one Edward H. Gaynor, and one Michael A. Connolly (hereinafter for the sake of brevity called the conspirators), devised, concocted, and put in operation a certain fraudulent scheme for the purpose of defrauding your orators, the United States of America.

(1) That the said fraudulent scheme contemplated that the said Oberlin M. Carter, as such engineer officer in charge of said Savannah district, should fraudulently exercise the said powers and of his office and discretion vested in him as aforesaid in favor of said conspirators and against the interest of the United States, and contrary to the duty and allegiance due by him to the Government under which he held such high and important trust.

4 (2) That said fraudulent scheme contemplated that by undue shortness of time in advertising the letting of contracts; that by withholding specifications from proposed bidders not in the conspiracy, as far as such withholding could be made consistent with the concealment of the fraud; that by drafting the specifications so

as to mislead proposed bidders not in the conspiracy as to the character and quantity of material really intended to be used in the work under the contracts, and by fraudulently and secretly furnishing to his coconspirators information as to the bids, and as to his future course as engineer and officer in charge, in the construction of the work under the contracts, the said Oberlin M. Carter would effectually suppress competition in the bidding for such contracts to be let for the United States through said Oberlin M. Carter, for said Savannah district, and that the said conspirators in the name of some one of them, or of some other person or corporation for their benefit, would be the only real bidders for such contract work for construction of jetties, spur dams, and training walls for the improvement of the rivers and harbors in said Savannah district. That thus all such contracts which would be from time to time let for such work as aforesaid would be obtained by some one or other of said conspirators or by and in the name of some other person or corporation but secretly for the benefit of said conspirators; to the end that the said river and harbor work in said Savannah district put out to be done on contracts would be fraudulently let for the benefit of said conspirators at high and exorbitant cost to the United States of America and at great profit to the said conspirators.

(3) That said fraudulent scheme further contemplated that said Oberlin M. Carter, as such engineer officer in charge as aforesaid, should, in drafting the specifications for contracts to be let by competitive bids for what is commonly called mattress work to be used in the construction of jetties, spur dams, and training walls in the river and harbor improvements in said Savannah district, would introduce into the specifications the novel provision of having two or more designs of mattresses specified, to be bid for by the proposed contractor at one price for either design, the one design to be very much more costly for the contractor to furnish than the other or others, but the engineer in charge to have the option after the contract should be let to call for either design he might choose to have put in the work, with intent that the bid of any person not a party to said fraudulent scheme who should propose to bid on such contract would have to be based upon the most costly design of mattress so specified, as the one most apt to be called for by the engineer, while the said conspirators, or the person acting for them, would be informed by the said Oberlin M. Carter before the bidding that only the cheapest design of those specified in the specifications would be called for to be put in the works, and would thus, even if the other means to suppress competition provided for in the fraudulent scheme should fail, be able to bid a very high price for the contract, based on the cheapest design of mattress, and still underbid all others and obtain the contract.

(4) That said fraudulent scheme further contemplated that said Oberlin M. Carter, as such engineer officer in charge as aforesaid, should in drafting the specifications for contracts to be let for jetties, spur-dams and training walls in said Savannah district, would

specify vaguely, and so uncertainly set forth the character, quality, quantity, description, and design of the material to be used in the work, (a) that when the material was furnished by the contractor under such contracts as should be so fraudulently obtained for the benefit of said conspirators as aforesaid, the said specifications could and would by a fraudulent, strained, and lax construction to be placed upon the same by said engineer in charge be made to apparently justify the acceptance and approval which he would make for payment at such high and exorbitant prices, of large quantities of material of very poor and cheap quality, description, and design, and of very small value to the United States; and (b) that when if by chance any person not a party to said fraudulent scheme should happen to be the lowest bidder and obtain any such contract in said Savannah district that by a fraudulent, unfair, rigid, and stringent construction to be placed upon the specifications by said engineer in charge the specifications could and would be made to apparently justify the rejection which he would make of material furnished by such contractor of very much better quality, quantity, description, and design and of a greater value to the United States, with the intent that by such oppressive rejections the performance of such contract would be made ruinous to the contractor so having dared to compete with said conspirators in bidding for such contract, and thus that further competition with the said conspirators would thereafter be effectually cut off.

(5) That said fraudulent scheme further contemplated that on all work so let on contracts which should be obtained for the benefit of said conspirators as aforesaid the said Oberlin M. Carter, as engineer in charge as aforesaid, would so instruct and locate the assistant engineers and inspectors under him, intended for inspecting the details of the work of construction, that there would be little,
6 if any, inspection of the details necessary to be inspected to insure the furnishing of honest work and material, and that the said Oberlin M. Carter as such engineer officer in charge would fraudulently accept for the Government under such contracts work done and material furnished known by him to be of inferior quality and quantity, and not in accordance with the specifications, to the end that the United States might be defrauded, with enhanced profits to the said conspirators.

(6) That said fraudulent scheme further contemplated that the said Oberlin M. Carter, as such engineer officer in charge as aforesaid, would fraudulently approve for payment, and when in funds as a disbursing officer fraudulently pay, accounts which would be rendered to him as such engineer officer in charge as aforesaid, by the said conspirators or by some one of them, or by or in the name of the person or corporation which should by the successful operation of said fraudulent scheme have obtained such contracts for the secret benefit of said conspirators, and which accounts should be rendered as aforesaid for such inferior material and work to be put into said works as aforesaid, and at the exorbitant and fraudulent prices

stated in such contracts so fraudulently to be obtained by said conspirators as aforesaid.

(7) That said fraudulent scheme further contemplated that the said moneys so fraudulently obtained on such contracts by the said conspirators through the said Oberlin M. Carter, as such engineer officer in charge and disbursing officer as aforesaid, should be appropriated to the use of the said conspirators, and that they should aid each other in the concealment from the officers of the United States not parties to the conspiracy of the moneys from time to time so misappropriated and of the investments thereof, to the end that said scheme might be further operated by them and that they might be secure from detection in the enjoyment of such moneys.

(8) That said fraudulent scheme further contemplated that out of the moneys so to be fraudulently appropriated by said conspirators as aforesaid certain portions, the full and exact amount of which is to your orators unknown, should be appropriated by the said William T. Gaynor and Edward H. Gaynor, and smaller sums by the said Michael A. Connolly, and that the net profits of such contracts after payments of said sums and the cost of the work would be divided between the principal conspirators, Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter.

7

III.

THE SCHEME TO DEFRAUD PUT IN OPERATION.

That pursuant to the scheme to defraud the United States so devised, concocted, and agreed upon between the said conspirators, the said Oberlin M. Carter, as such engineer officer in charge of said Savannah district, did on or about the first day of January, 1891, commence to put said fraudulent scheme in operation in said Savannah district, and to exercise the said powers and discretions of his office in favor of the said conspirators and against the United States in accordance with said fraudulent scheme, and continued so to do as successive contracts were to be let and were let from time to time by said Oberlin M. Carter, as such engineer officer in charge as aforesaid, until on or about July 20th, 1897, when the said Oberlin M. Carter, as such engineer officer in charge as aforesaid, was relieved from duty and superseded. And each of the conspirators aforesaid commenced on or about the first day of January, 1891, to do and perform their parts in the accomplishment and carrying out of said fraudulent scheme to defraud the United States, and continued so to do as successive contracts were to be let, and were let, in said Savannah district from time to time; in the suppression of competition in the letting of the contracts; in the obtaining of the contracts in the name of some one of the conspirators, or of some other person or corporation, for the benefit of said conspirators at high, exorbitant, and fraudulent prices; in putting into the construction under the contracts poor, cheap, and inferior material and work not in accordance

with the specifications of the contracts; in the rendering of accounts against the United States for such poor, cheap, and inferior material and work not in accordance with the specifications as aforesaid and at said high, exorbitant, and fraudulent prices fixed in said contracts so fraudulently obtained for the benefit of said conspirators as aforesaid; and in the approval and payment of said accounts by the said Oberlin M. Carter as engineer officer in charge; and in the division of the said moneys so paid between the said conspirators and the concealment thereof, not only until the said Oberlin M. Carter was relieved from duty as such engineer officer in charge of said Savannah district on or about July 20, 1897, as aforesaid, but thereafter continued and have continued until this date to aid and abet each other in the concealment of the moneys so fraudulently obtained from the United States, through the operation of said scheme and in their endeavor to obtain additional moneys from the United States for work alleged to have been done under such contracts so fraud-
8 ulently obtained at the exorbitant and fraudulent prices secured in said contracts by the operation of said fraudulent scheme; and for the poor, cheap, and inferior material put into said constructions, not in accordance with the specifications.

IV.

DESCRIPTION OF THE ENGINEERING WORK.

That the principal expenditures made by the United States in river and harbor improvements in said Savannah district, both under General Q. A. Gilmore, the predecessor of the said Oberlin M. Carter in charge of said district, and under the administration of the latter, were in the construction of spur dams and training walls, commonly included under the generic term of "jetties" and being a kind of dam or wall constructed of "logs and brush and stone" or of "brush and stone," so placed as to narrow the channel, or so placed in reference to the channel as to effect the flow of the current, and as a result of the increased flow of water to cause an increase in the depth of the channel.

Prior to the formation of the scheme to defraud the United States formed on about January 1st, 1891, as aforesaid, the brush or logs and brush used in these jetties in the Savannah district were put into the construction principally in three ways:

Fascines. One of the principal materials used in the construction of jetty work was the brush fascine.

These fascines were usually, among other things, specified to be made of live brush, well trimmed, the butts of the brush to be placed in alternate directions, and the fascine to be closely choked by ties of wire or tarred rop at intervals of every two or three feet, so as to form an artificial log of the diameter of from 9 to 15 inches at the choke, and from 12 to 20 feet in length, according to the specifications

for the particular contract. The form of construction of a fascine being illustrated by drawing, Exhibit A, filed herewith.

(1) There were the training walls and spur dams built up of fascines, placed in the training wall or dam by the contractor separately; that is to say, each fascine being put in place one at a time.

Prior to the formation of said fraudulent scheme as aforesaid the prevailing contract prices for fascines so put in the works in the district ranged from 89 cents to $1.10 per cubic yard. That is to say the fascines were piled up on top of each other and measured,
9 and the fascine material contained in a square yard of surface, and of the depth of one yard, cost the Government when placed in the work only from 89 cents to $1.10, according to locality.

(2) The brush mattress. In the contracts let prior to the formation of the said scheme to defraud, where the contract provided for the construction of training walls or spur dams to be built up of fascines, it was provided that the engineer officer in charge could require the fascines to be placed in the jetty either singly or in mats, and when made into mats and so placed, the mats were paid for by the amount of fascine material composing them, at the contract price of fascines per cubic yard, ranging from 89 cents to $1.10 per cubic yard as aforesaid. These fascine mattresses were usually constructed of a layer of fascines placed side by side, upon a layer of transverse poles spaced at intervals of about 6 feet apart, and upon top of the layer of fascines were placed another layer of poles similarly spaced at intervals, the upper and lower poles being joined by ties of wire or tarred rope, so as to form a flexible mattress.

The form of construction of such a mattress is illustrated by drawing, Exhibit B, filed herewith.

In some of the contracts the fascines rest upon a grillage of poles instead of upon a single layer of poles at the bottom, and also there was a corresponding grillage of poles on top of the fascines. By a grillage of poles is meant a layer of poles spaced a few feet apart crossed by a second layer of poles similarly spaced. The form of construction of such a mattress is illustrated by Exhibit C, filed herewith.

When a mattress is constructed as shown in drawing, Exhibit B, the fascines are said to be placed between a half grillage of poles at the bottom and a half grillage of poles at the top, as there are only half as many poles used in such case as where there is a full grillage of poles at the bottom and at the top as shown in drawing, Exhibit C.

When a mattress was so constructed it was towed to its place, a single mat at a time, and loaded with stone and sunk in its place. The stone used in sinking such mats, or in holding down the fascines when put in separately, being paid for by the Government in addition to the price paid for the fascine material.

The reason that the contractor could afford to put in the fascines in mats as cheaply as when put in separately was that the extra material required in binding poles was fully compensated for by the

less labor and difficulty involved in sinking the larger number of fascines going to make up a mat at one performance.

10 As a consequence the Government obtained such fascine mattresses as it used in said Savannah district, prior to the formation of the conspiracy, at prices ranging from 89 cents to $1.10 per cubic yard—equivalent for a mattress made of fascines 9 inches, or one-fourth of a yard, in diameter, to 22¼ to 27½ cents per square yard of mattress surface, or equivalent for a mattress made of fascines 12 inches in diameter to 29⅝ to 36⅔ cents per square yard; or equivalent for a mattress made of fascines 18 inches in diameter to 44½ to 55 cents per square yard.

(3) The log mattress. There was also used in said Savannah district in jetty construction, prior to the formation of said scheme to defraud, what is commonly called a "log mattress." This is sometimes called, however, a "log and brush mattress," because both logs and brush were used in combination in its construction.

The principal design of this mattress was a raft of logs of the average diameter of 12 inches, placed side by side and fastened together with cross poles placed as binders 8 feet apart and spiked to the logs, and upon this raft was placed a top layer of live brush, or live-brush fascines, from 5 to 6 inches in thickness in the finished work, and secured in place by poles lashed to the binders of the raft, thus making a mattress 18 inches thick, exclusive of the binding poles. The form of construction of such a log mattress is illustrated in drawing, Exhibit D, filed herewith.

These log mattresses were always paid for in contracts under General Gilmore and under Carter at a stipulated price by the square yard, surface measure, the price averaging about 47 cents per square yard prior to the formation of the conspiracy.

Prior to the formation of said scheme to defraud, whenever specifications had been drafted by Gilmore or by Carter in which it was provided that two or more different designs of mattress under the same contract should be bid on by the contractor, it was always provided that separate prices should be bid for furnishing either of the designs the engineer might call for. Or if the contract called for only one price to be bid for two or more designs, it always left it optional with the contractor to furnish that design which he could furnish the most cheaply. So that always the contractor would know precisely the thing upon which he was bidding before the contract was let, and at the time he had to put in his bid in competition with other bidders.

11 V.

DETAILS OF THE FRAUD INTRODUCED INTO AND UNDER THE CONTRACTS.

Your orators further aver and charge that early in 1891 the said Oberlin M. Carter, as engineer officer in charge of said Savannah district, commenced to put in operation said fraudulent scheme in

respect to the drafting, and by his recommendation causing to be approved by his official superiors, specifications so drawn as to enable said conspirators to consummate said fraud upon the United States.

(1) That in the drafting of the specifications for contract No. 4572 for Cumberland Sound, advertised March 17, 1891, and let May 4, 1891, to John F. Gaynor, the said Oberlin M. Carter, as such engineer officer in charge, for the purpose of carrying into effect said fraudulent scheme, introduced into the specifications upon which proposed bidders would be required to base their bids for the contract, three designs of mattress. Two of these designs were for log mattresses 16 inches thick in the finished work, similar to those provided for in t Gilmore contract of October, 1886, No. 3285, for Cumberland Sound, which allowed the contractor to use the design he preferred, but Carter provided in his specifications for a third design of brush mattress made of fascines 9 inches in diameter, and required bids for it by the square yard, instead of by the cubic yard, as such mattresses had heretofore been paid for, and he provided in the specifications that the engineer in charge should have the option of substituting the "brush mattress" for the log mattress in the construction of the work.

Having succeeded by use of said fraudulent scheme in suppressing competition and awarding said contract to John F. Gaynor at the rate of 99 cents per square yard for log mattresses, being double the price of the same theretofore prevailing, and at the rate of 97 cents per square yard for brush mattresses, being nearly four times the price of such mattresses theretofore prevailing in said Savannah district, the said Carter corruptly exercised his option in favor of said contractor and allowed him to put in all brush mattresses at the exorbitant rate of 97 cents per square yard.

(2) By a corrupt use of a similar brush mattress in the specifications in contract No. 4637 of July 20th, 1891, for jetties at Fort Clinch, let nominally to William H. Walsh, but for the benefit of said conspirators, and by providing in the specifications for a bid
12 for mattresses per square yard and fascines per cubic yard, but leaving it optional with the engineer in charge to use either fascines separately or mattresses, and by the use of the said other means provided in said scheme for suppressing competition the said Oberlin M. Carter succeeded in awarding the said contract as aforesaid at 99 cents per square yard for brush mattresses, equivalent to about $3.56 per cubic yard, while the fascines themselves were awarded in the same contract at only $1.57 per cubic yard when placed in singly and whereas theretofore such mattresses had only cost the Government the price of the fascines in them by the cubic yard. And having so awarded said contract said Carter corruptly exercised his option as engineer in charge by allowing said contractor to put into the work 7,744 square yards of mattresses at $3.56 per cubic yard, and only 125 yards of fascines at $1.57 per cubic yard.

(3) In the specifications drafted by said Oberlin M. Carter as such engineer in charge, for the contract No. 4820 next let to Edward H. Gaynor, September 16, 1892, the said Oberlin M. Carter, in pursuance of said fraudulent scheme and corrupt agreement, introduced the following novel features, by which it was placed in the power of said Carter, at his will, to shut out all competition with the said conspirators in the bidding for such contract work, and which fraudulently secured to said conspirators an increase of four times the price for brush mattresses previously prevailing for same at the same locality. That is to say: Carter so drafted the specifications for contract 4820, which were adopted on his recommendation, as to provide for three different designs of mattresses, any one of which might be called for at his option by the engineer in charge, and to be paid for at the same price per square yard for either design furnished by the contractor.

The first design of mattress so provided for corresponded to the log mattress 18 inches thick, Exhibit D, hereinbefore referred to.

The second design of mattress so provided for corresponding to the brush or fascine mattress, Exhibit C, hereinbefore referred to, except it had an additional cross layer of fascines in it, the additional fascines being spaced the same distance apart as the cross poles.

The third design of mattress so provided for corresponding to the brush or fascine mattress nine inches thick, Exhibit C, and being the same as the second design without addition of the cross fascines.

And while prior to the formation of said fraudulent scheme the prevailing price in said Savannah district of the first design
13 of mattress was double that of the third design, said Oberlin joined them in his specifications to be bid on at one price.

And when by means of suppressing competition through said fraudulent scheme said Oberlin M. Carter succeeded in awarding said contract to Edward H. Gaynor for the benefit of said conspirators, at the price of $1.05 per square yard surface measure, equivalent to $4.20 per cubic yard for brush material in the 3rd design or 300 per cent higher than the prices which had prevailed in the same locality, said Oberlin M. Carter fraud'ently exercised the option reserved to him as such engineer in charge under the specifications, in the manner of which the conspirators only were apprised before the bidding, and allowed the conspirators to put in all brush mattresses of the third and cheapest design, as aforesaid.

(4) In the specifications drafted by said Oberlin M. Carter, as such engineer in charge, for the contract No. 4960, next let to the Atlantic Contracting Company, October 22, 1892, known as the "Big three million dollar contract for Savannah Harbor," the said Oberlin M. Carter, in pursuance of said fraudulent scheme, put in the same three designs of mattresses to be bid on at one price, as in contract No. 4820, and giving the same option to the engineer to select after the letting of the contract any one of the three for use in the construction, and having succeeded by means of said fraudulent scheme

in awarding said contract to the Atlantic Contracting Company for the benefit of said conspirators, at the exorbitant and fraudulent price of 95 cents per square yard of mattress surface, equivalent to $3.80 per cubic yard for brush material in the 3rd design, the said Oberlin M. Carter, as such engineer in charge, fraudulently exercised the option reserved to him as engineer in charge and allowed the conspirators to put in all the mattresses of the third and cheapest design.

(5) Your orators aver and charge that not content with the fraudulent addition of about 300 per cent to the cost of the fascine mattresses secured to the contractor in the letting of the contracts as aforesaid, the said Oberlin M. Carter, under contracts Nos. 4820 and 4960, commenced about September, 1893, to allow the contractors operating said contracts for the benefit of said conspirators to supply in lieu of the single mattress provided for in the specifications, and to put into the jetties at one time and at one launching a construction of from 4 to 8 or more of single mats piled up one on top of the other and forming what is called a multiple mat, in which each single mat constituted a course, or layer, but from which a large part of the material required by the designs of brush mattress
14 in the specifications was omitted, and which multiple mat was very much cheaper for the contractor to put in than the cost of putting in the single mats composing it separately, as the specifications indicated they would be put in and authorized the engineer to require, and as other proposed bidders had to estimate for in putting in their bids.

And said Carter allowed said contractors not only to put in said material and work not in conformity even to the cheapest design of mattress provided for in the specifications, but of the poorest and cheapest and most inferior material which he could allow passed without detection of the fraud through a fraudulent and strained construction of the specifications. And said Oberlin M. Carter, as such engineer in charge, approved for payment and paid the accounts of said contractors for such work at contract prices for said work so put in.

(6) Your orators further aver and charge that by act of Congress passed in 1888 and repeated in act of 1890, Supplement Revised Statutes, page 600, it was provided that river and harbor contracts shall be made "after sufficient public advertisement for proposals in such manner and form as the Secretary of War may prescribe." That section 520 of the Army Regulations prescribed by the Secretary of War prescribed and prescribes that the length of time for advertising for proposals for services by contractors for supplies or services should be 30 days or more or 10 days or less according to the needs of the service; large contracts for purchases or services should be 30 days or more. That section 519 of the Army Regulations prescribed that:

"Any officer charged with the duty of making a contract on purchase is responsible under the laws and regulations for his action.

Permission or orders to make a contract or purchase without competition will not justify the procedure and will not be given."

And your orators aver and charge that while prior to 1890 the contracts in the Savannah district were mostly for comparatively small expenditures, from about $15,000 to $110,000, that after 1890 some of the contracts ran up to several million dollars each, being over $3,000,000 for Savannah Harbor contract No. 4960 for 1892, over $1,000,000 for Savannah Harbor contract No. 6515 for 1896, and over $2,000,000 for Cumberland Sound contract No. 6517 of 1896. Nevertheless said Oberlin M. Carter, as such engineer in charge, in pursuance of said scheme to defraud the United States and to suppress competition, did not advertise the letting of any of the contracts let by him from 1891 to 1897, inclusive, for 30 days or more, but the advertisements for many of said lettings being run only for 15 to 22 days in the local papers, and for a less time in the engineering papers in which Government advertisements were required to be published, and the time said advertisements were so run not being a sufficient public advertisement to enable contractors in different parts of the United States to ascertain the details sufficiently to intelligently put in competitive bids.

(7) Your orators further aver and charge that from 1891 to 1897, inclusive, the said Oberlin M. Carter, in pursuance of said fraudulent scheme to defraud the United States, systematically withheld from applicants therefor, as far as he could consistent with the concealment of the fraud, the specifications for contracts advertised by him, and delayed and hindered such applicants in obtaining such specifications to the end that competition with said conspirators in proposals for contracts might be and was suppressed.

(8) Your orators further aver and charge that by applying said fraudulent scheme to the drafting of the specifications, in the manner hereinbefore described for contracts Nos. 4572 and 4820, to each of the contracts subsequently advertised and let in said Savannah district, and by applying said fraudulent scheme in suppressing competition by shortness of advertising for proposals for contracts and by withholding specifications and delaying applicants in obtaining the same, and by giving secretly to the said conspirators information as to how the said Carter, as engineer in charge, would exercise his discretion in construing specifications purposely by him made ambiguous or uncertain, the said Oberlin M. Carter, as engineer officer in charge, succeeded in awarding at high, exorbitant, and fraudulent prices every jetty contract let by him in said Savannah district from 1891 to 1897, inclusive, to the said conspirators or to some one of them, or to some person or corporation, for their benefit, except one small contract, No. 5359, for Savannah River near Augusta, let to Albert J. Twiggs, July 5, 1893, and as to this one exception the said Carter applied such stringent and unfair construction of the specifications as to make the performance of the contract ruinous to the

contractor, and thus prevented him from any further competition with said conspirators. A list and the dates of said contract so fraudulently let at high, exorbitant, and fraudulent prices, about 100 per cent above the fair value of the same, for the benefit of said conspirators, from 1891 to 1897, inclusive, reference being had to the War Department file number, being as follows:

4572. May 4, 1891, John F. Gaynor, contractor; improvement at Cumberland Sound.

16 4637. July 20, 1891, W. H. Walsh, contractor; improvement at Fort Clinch.

4655. Sept. 9, 1891, John F. Gaynor, contractor; improvement at Savannah River, Augusta.

4820. Sept. 16, 1891, E. H. Gaynor, contractor; improvement at Cumberland Sound.

4960. Oct. 22, 1892, Atlantic Contracting Co., contractor; improvement at Savannah Harbor.

4963. Oct. 24, 1892, W. H. Walsh, contractor; improvement at Savannah River, Augusta.

5127. Dec. 20, 1892, Atlantic Contracting Co., contractor; improvement at Darien Harbor.

5133. Dec. 20, 1892, Atlantic Contracting Co., contractor; improvement at Altamaha River.

5253. Mch. 1, 1893, Atlantic Contracting Co., contractor; improvement at Darien Harbor.

5254. Mch. 20, 1893, Atlantic Contracting Co., contractor; improvement at Brunswick Harbor.

5811. Nov. 15, 1894, Anson M. Bangs, contractor; improvement at Cumberland Sound.

6049. Apr. 20, 1895, W. T. Gaynor, contractor; improvement at Darien Harbor, etc.

6515. Oct. 8, 1896, Atlantic Contracting Co., contractor; improvement at Savannah Harbor.

6517. Oct. 8, 1896, Atlantic Contracting Co., contractor; improvement at Cumberland Sound.

Under each and all of which contracts so fraudulently let the said Oberlin M. Carter, as such engineer officer in charge, in pursuance of said scheme to defraud the United States, allowed the said contractors to put in cheap and inferior material not in accordance with the specifications in the contracts, and fraudulently exercised in favor of the contractors the options so fraudulently reserved to him in the specifications as engineer in charge. And under each of which

17 contracts the said Oberlin M. Carter, as such engineer officer in charge, in pursuance of said fraudulent scheme, approved for payment, and paid whenever in funds as disbursing officer, the accounts of the said contractors for such work at the high, exorbitant, and fraudulent prices so provided in said contracts so fraudulently let.

VI.

THE DIVISION OF THE MONEY.

Your orators further aver and charge that the profits of every one of said contracts so fraudulently let for the benefit of said conspirators as aforesaid, from 1891 to 1897, inclusive, were divided from time to time between said conspirators.

(1) That in the division between Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter, of the net profits of the contracts so fraudulently obtained prior to the contract No. 4820, of Sept. 16th, 1892, hereinafter referred to, your orators are unable to state exactly what share was allotted and apportioned to the said Oberlin M. Carter, but your orator avers that amounts aggregating $16,000 were traced with reasonable certainty from the profits of said contracts back into the possession of said Oberlin M. Carter, after he had, as disbursing officer, paid out the same on the contracts. How much more the said Carter may have been apportioned as his share of the profits on said prior contracts is to your orators unknown.

(2) Your orator avers and charges, however, that commencing with contract No. 4820 of September 16th, 1892, let in the name of Edward H. Gaynor, contractor, that after the payment of the cost of the work and after the payment to the other persons parties to the said fraudulent scheme as aforesaid, the profits amounting to over two million dollars ($2,000,000), of all the aforesaid contracts so fraudulently let as aforesaid, were divided from time to time between Oberlin M. Carter, Benjamin D. Greene, and John F. Gaynor, in three equal shares, one of which shares was apportioned to the said Oberlin M. Carter as his share of the profits arising from the consummation of said scheme to defraud the United States.

(3) That the said Oberlin M. Carter, as engineer officer in charge of said Savannah district, usually had funds to his credit as disbursing officer in the Merchants' National Bank of Savannah, Ga., or with the assistant treasurer of the United States at New York, intrusted to him by the Government for disbursement to contractors on
18 Government contracts, and when in funds during the operation of said fraudulent scheme in said Savannah district, he usually paid the contractors at the beginning of each month for the amount of the vouchers approved by him for the work of the preceding month, reserving 10 per cent each month until the last payment on the contract.

That the better to secure his share in the fraudulent profits of the contracts, it was usual for said Oberlin M. Carter as such disbursing officer to issue the checks for the monthly payments to the contractors in two batches. One batch was deposited in the local banks at Savannah and Fernandina and used in defraying the cost of the work, and in payments to E. H. Gaynor and W. T. Gaynor and minor agents of the principal conspirators, and the other batch

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of checks representing the net profits would usually be taken by said Oberlin M. Carter in person to the city of New York, and the proceeds of said checks, after said Carter was paid therefrom $75 for an allowance for his trip to New York, would be divided between said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter, each getting a third as aforesaid.

That sometimes said Oberlin M. Carter did not go on to New York and carry the disbursing checks there for division, but would send the checks to the said Benjamin D. Greene, or John F. Gaynor, who would, at the direction of the said Oberlin M. Carter, pay over his third of the fraudulent profits as aforesaid, to Robert F. Westcott (now deceased, the former father-in-law of said Carter), who would invest it and turn over the investment to said Oberlin M. Carter or otherwise dispose of it for the use and benefit of said Carter as said Carter directed.

(4) That although the work was authorized by act of Congress, the money for payment of the bulk of the work under contracts of Oct. 8, 1896, No. 6515 for Savannah Harbor and No. 6517 for Cumberland Sound, let in the name of the Atlantic Contracting Company, contractor, was not available until July 1st, 1897. That by reason of the fact that all the profits of the previous contracts had been divided between the parties to the fraudulent scheme it became necessary that the parties interested should put up the money to carry on the work under these contracts of Oct. 8, 1896, until July 1, 1897, when the appropriation of money by Congress would be available, as the general plan of issuing disbursing checks monthly to carry on the work theretofore pursued could not be resorted to. To meet this necessity on or about the first day of January, 1897, the said persons devising said scheme as aforesaid, communicated each with the other, and
19 agreed among themselves that the said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter would each respectively advance approximately one-third of the amount which it might be necessary from time to time to advance to carry on the work under said contracts, until such time as the money appropriated by Congress for payment of the work under said contracts should become available. And it was then and there further agreed between said conspirators that all of the provisions of said scheme to defraud the United States which had been in operation by and between the said parties in said district from 1891 to that time as aforesaid, should be applied in and to the execution and completion of the work under said contracts of October 8, 1896, which had been so fraudulently let as aforesaid, and in the obtaining of the money for the fraudulent accounts which should be rendered under said contracts to the said Oberlin M. Carter as such engineer officer in charge as aforesaid, and in the division of the said moneys between the said conspirators, except that the money so advanced by said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter, to carry on the work, should be repaid them before the division of the profits between them as aforesaid. That in pursuance of the said

scheme to defraud so modified as aforesaid the said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter did from time to time each advance moneys to carry on the work under said contracts of October 8, 1896, until July 1, 1897, when the appropriation by Congress became available.

And the said Oberlin M. Carter, as engineer, did approve accounts rendered by said conspirators in the name of the Atlantic Contracting Company for large amounts charged for cheap and inferior work not done in accordance with the specifications of the contracts and at the high, exorbitant, and fraudulent prices at which said contracts had been so fraudulently let, and did on or about July 6th, 1897, pay upon said accounts so approved by him the sum of $575,749.00, which said amount less the deductions for moneys so advanced by said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter for carrying on the work, and for the shares of the lesser conspirators, and for advances to further carry on the work, was divided in thirds between the said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter.

And the said conspirators have continued to aid and abet each other to this day in their endeavor to obtain from the United States additional moneys for work alleged to have been done under said contracts of October 8th, 1896, so fraudulently obtained at the exorbitant and fraudulent prices secured in said contracts by the operation of said scheme to defraud, and for the cheap and inferior material and work put into said construction under said contracts not in accordance with the specifications.

VII.

GREENE'S INVESTMENTS.

Your orators aver and charge, that the following table gives in one column a statement of the dates when said divisions of the profits of said fraudulent contracts were so made by and between the said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter, by thirds as aforesaid, and in the next column gives at said respective dates, said Benjamin D. Greene's share of the profits so fraudulently obtained from the United States on said contracts so fraudulently let and performed as aforesaid, and the amount at each successive date is obtained by adding the previous shares so obtained by said Benjamin D. Greene, his share obtained at the respective date, so as to show his accumulated profits, or the aggregate of his profits so fraudulently obtained at said respective dates, like amounts having been likewise retained by the said Oberlin M. Carter and John F. Gaynor.

And your orators aver and charge that all of said profits so fraudulently obtained from the United States by the said Benjamin D. Greene, constitutes in the hands of the said Benjamin D. Greene and of all persons taking or holding the same with notice of said

fraud a trust fund, for the benefit of your orators. And that where said funds or proceeds of the same or any part thereof, have been used in the purchase or acquisition of other property from innocent third parties, that the said trust follows the investment, and that said investments in the hands of the Benjamin D. Greene or other persons holding the same for him, or taking the same with notice of the fraud, constitutes a trust fund and is held for the benefit of your orators.

21 *Table of the fraudulent profits retained by each of the three chief conspirators.*

Number and dates of division.		Aggregate of thirds exclusive of $1,575 arbitrary allowance Carter's trips to New York.
Number.	Date.	
	1903.	
2	Jan. 3	12,900.04
3	Feb. 10	28,900.00
4	Mch. 13	44,900.04
5	Apl. 14	65,618.15
6	May 8	80,618.15
7	June 5	93,118.15
8	July 11	129,118.15
9	Aug. 7	142,118.15
10	Sept. 6	166,418.15
11	Oct. 10	178,418.15
12	Nov. 6	184,418.15
13	Dec. 4	205,418.15
	1894.	
14	Jan. 8	221,918.15
15	Feb. 5	239,918.15
16	Mch. 5	247,918.15
17	July 9	277,536.02
18	Sept. 10	419,586.02
19	Oct. 5	440,586.02
20	Nov. 12	450,586.02
21	Dec. 11	458,865.93
	1895.	
22	Jan. 17	468,507.59
23	Feb. 4	478,507.59
24	Mch. 5	485,578.47
25	Apl. 8	508,886.80
26	May 22	517,981.83
27	June 7	536,725.64
28	July 5	582,256.33
29	Aug. 5	589,666.32
30	Sept. 3	589,802.92
	1896.	
31	May 12	595,836.36
	1897.	
32	July 6	722,528.03

O. M. Carter's share, $722,528.02.
B. D. Greene's share, $722,528.03.
J. F. Gaynor's share, $722,528.03.

22 Your orators file herewith as Exhibit E a table setting forth the fraudulent profits of the aforesaid contracts, which were divided by thirds between Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter, and the aggregate amounts thereof retained by said Benjamin D. Greene out of the divisions so made, to which the usual leave of reference is prayed.

Your orators file herewith as Exhibit F a table setting forth certain of the proceeds of said fraudulent profits from the share of the same retained by said Benjamin D. Greene, aggregating $113,926.55, which have been traced into the possession of the said Luther Laflin Kellogg, to which table the usual leave of reference is prayed.

VIII.

THE BOARD OF INQUIRY.

(1) Your orators further aver and charge that it having been determined by the new Chief of Engineers, General John M. Wilson, who succeeded to that office about February, 1897, to make a general change of the officers in the Corps of Engineers from one district to another for the general good of the service, and that fact becoming known to the said Oberlin M. Carter he succeeded in causing himself to be appointed as military attache to the Court of St. James, and also as a member of the Nicaragua Canal Commission, and the said O. M. Carter being superseded as engineer officer in charge of the Savannah district on July 17, 1897, his successor, Captain Cassius E. Gillette, took charge of the district July 20th, 1897.

Within two weeks after taking charge of the Savannah district facts began to come to the attention of Captain Gillette showing irregularities in the administration by said Carter of the affairs of the district of the gravest character.

It was developed that a large number of the official files and documents of the office had been with a great deal of his private papers packed up by Carter in a file case, which he caused to be boxed, and which he directed to be shipped to him. This box was detained.

This state of affairs led to the appointment by the President of a board of inquiry, of which Colonel George L. Gillespie (now General Gillespie) was president.

In the meantime the said Oberlin M. Carter hurried back from England. Arriving in New York City early in September, 1897, said Carter expected to be arrested, and took out of his safety deposit box securities of the cost value of $414,437.50 which he had there,
23 constituting a part of the investments, which he had made from his share of the illegal profits of the contracts as aforesaid, and turned them over to the said Benjamin D. Greene and John F. Gaynor at the Hoffman House for safe keeping.

These securities were in a day or two delivered by said Benjamin D. Greene to the said Robert F. Westcott for safe keeping for said Carter, and Westcott placed them in his safety-deposit vault. Shortly

thereafter the facts in regard to Carter's guilty connection with said Benjamin D. Greene and John F. Gaynor in the contracts began to be given publicity in the newspapers, and the said Robert F. Westcott, upon the advice of his counsel and in the presence of his counsel, delivered back to Carter all of the aforesaid securities so turned over to Westcott by said Greene, and took said Carter's receipts for the same in detail, which receipts are dated respectively October 11, 1897, and October 29, 1897, and which original receipts came to the knowledge and into the possession of your orators on or about the month of July, 1900, and are held subject to the inspection of the court.

Your orators further aver and charge that said board of inquiry appointed to inquire into the propriety of court-martial proceedings met in Savannah on September 21, 1897, and the said detained file case was opened by the said Oberlin M. Carter in the presence of said board, and in it were found a large mass of incriminatory evidence tending to show conspiracy between the said Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter in such contract work aforesaid in Savannah district, and showing that said Carter's personal expenditures had run up from about $4,300 per annum in 1890 to $28,611.67 in 1896, as hereinbefore set forth, and showing that the income so spent by said Carter was derived from a large amount of securities which Carter was handling during said period. And said Carter, in order to explain his possession of said securities and his spending of the income from the same, caused the said Benjamin D. Greene and said John F. Gaynor to come before said board and make statements in his presence to the effect that neither the said Oberlin M. Carter nor the said Robert F. Westcott had been in any way beneficially interested in any of said contracts let in said Savannah district, and the said Carter himself made before the said board a like statement, and further stated that the large income so spent by said Carter from securities was from gifts given him by the said Robert F. Westcott, his former father-in-law, from the private fortune of said Westcott, to whom the securities belonged and in which Carter had no interest. Your orators further aver and charge that after due investigation said board of inquiry recommended the convening of a court-martial to try said Oberlin M. Carter on the
24 charge, among other things, of conspiracy with the said Benjamin D. Greene, John F. Gaynor, and others to defraud the United States as hereinbefore set forth, although at that time the details by which the said conspiracy was carried out and the money divided between the conspirators as hereinbefore set forth was not fully known.

THE COURT-MARTIAL.

(2) Your orators further aver and charge that in due course a court-martial was duly constituted and convened at Savannah on the 12th day of January, 1898, of which General Elwell S. Otis was president, and the other members being all disinterested engineers or officers distinguished in other branches of the military profession.

The trial of Captain Carter before this court-martial on the charges was continued through three months and attracted more attention and was given greater publicity through the newspapers and otherwise than any other similar event in the history of the country, and the details of the evidence published every day in almost every important newspaper throughout the United States give a notoriety to the facts in issue in the case such as probably no similar case has ever had.

Before this court-martial the said Carter and the said Benjamin D. Greene were volunteer witnesses in behalf of said Carter, and again stated that neither said Robert F. Westcott nor the said Carter had been interested beneficially in said contracts, and that the said securities handled by said Carter were the securities belonging to the private fortune of the said Robert F. Westcott, which said Carter had no personal interest, but the income from which had been given him by said Westcott. Your orators further aver on information that the said Oberlin M. Carter endeavored to induce the said Robert F. Westcott to appear before said court-martial and testify falsely to the same effect, but the latter, while he did not desire to testify against the husband of his dead child, would not consent to go upon the stand otherwise than to tell the truth of the transaction, and to disclaim any interest in these securities and investments. To avoid testifying against his said son-in-law, said Robert F. Westcott departed to Europe and remained away during the court-martial proceedings.

Your orators further aver and charge that by reason of the fact that the said court-martial had no power to compel civilian witnesses to testify, and no power to compel such witnesses to produce books and papers, the evidence before the said court-martial did not develop the particular divisons of the money paid on said contracts between the conspirators nor trace and locate the specific funds
25 so divided into specific securities as has since been done and set forth in this bill. Nevertheless, the evidence of conspiracy to defraud the United States, entered into between the said conspirators in the letting of the contracts and the doing of the work under them, and the possession by Carter of so large an amount of securities from which he was enjoying the income without any satisfactory explanation, furnished proof so plain of the guilt of said Oberlin M. Carter that he was convicted by said court-martial and sentenced to dismissal from the Army, to pay a fine of $5,000, and to be imprisoned at hard labor for five years.

The firm of Kellogg, Rose & Smith, of which the said L. Laflin Kellogg was a member, were of counsel for said Oberlin M. Carter in said court-martial proceedings; and by and through said court-martial proceeding said Kellogg had full notice of the said fraud.

THE APPEAL.

(3) Your orators further aver and charge, that an appeal was made by said Oberlin M. Carter to the President of the United States to

review the judgment of the said court-martial. That on account of the pressure of public business consequent upon the pendency of the war with Spain, there was some delay in the disposition of said appeal, and the Attorney General to whom a review of the evidence was referred by the President, did not reach a conclusion confirming said judgment until about the 29th day of September, 1899, and this was followed by the confirmation of the judgment by the President, following which the said Oberlin M. Carter was placed in confinement, and after some preliminary efforts made by him to obtain release by habeas corpus proceedings conducted by the said firm of lawyers of which said Kellogg was a member, he was imprisoned in said penitentiary at Fort Leavenworth, Kansas.

THE INDICTMENT OF GREENE AND THE GAYNORS ET AL.

During the pendency of said appeal such original documents and evidence throwing light upon the frauds committed as aforesaid were in the possession of the President or the Attorney General for him. As soon as the said appeal was disposed of the said evidence was turned over to the district attorney for the Southern District of Georgia, who forthwith proceeded to put said evidence before the grand jury for said district, and on the 8th day of December, 1899, said grand jury returned a true bill of indictment against the said
Benjamin D. Greene, John F. Gaynor, William T. Gaynor,
26 Edward H. Gaynor, Michael A. Connolly, and Oberlin M.
Carter, charging them with conspiracy to defraud the United States by and through said scheme to defraud as substantially set forth in this bill.

THE HEARING FOR REMOVAL.

(4) The said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor were arrested in New York City on December 11th, 1899, on warrants issued by John A. Shields, United States commissioner for the Southern District of New York, based upon said indictment and affidavit thereto, and being in due course identified by evidence as the defendants therein, were committed in default of bail to await a warrant of removal, from his honor, Judge Addison Brown, the district judge, to Georgia for trial. The judge who held the matter under advisement some months, on June 26th, 1900, made an order referring the case back to the commissioner to take evidence on the merits as to the guilt or innocence of the accused for the purpose of establishing probable cause of guilt.

On July 6th, 1900, the hearing was renewed before Commissioner Shields, and with some short recess was proceeded with, and a large amount of oral and documentary evidence on all features of the case was put in on both sides and until December 23, 1900, when the case was submitted to the commissioner for his finding on the evidence, on March 21, 1901, the commissioner, who had the voluminous record under consideration in the meantime, made his finding of probable cause of guilt and again committed said defendants into custody for removal to Georgia for trial.

On the 23rd day of May, 1901, his honor, Judge Brown, made an order affirming the finding of said commissioner and directed the removal of the said defendants to Georgia for trial.

Your orators further aver and charge that while said hearings were being proceeded with your orator's agents and attorneys, by great labor and strenuous efforts, were enabled through the greater effectiveness of the processes of the civil courts, to obtain a large amount of documentary and other evidence from banks, brokers, and others, unknown to your orators until then, demonstrating the division of the fruits of the said fraudulent scheme between the said conspirators as set forth in this bill.

The said Robert F. Westcott too had returned to the United States, and the case against his son-in-law Carter having been ended by his imprisonment under sentence in the penitentiary, expressed his willingness to testify as against the other conspirators to the facts
27 within his knowledge and turn over to the Government all his checks, check books, and documents bearing upon questions in issue. This the said Westcott did, and it was found by the Government's expert accountant, as testified to at said hearing, that while a considerable part of the proceeds of said divisions of the profits of said contracts had passed through said Westcott's hands, and while a large part had been handled through the banks in Westcott's name under powers of attorney held by said Carter, that said Westcott had retained no part of the same, but that the same or the investment of the same almost immediately after division found its way into the possession of said Oberlin M. Carter, who proceeded to enjoy the income therefrom.

Your orators aver and charge that the said firm of Kellogg & Rose (the former partner Arthur H. Smith having retired), represented as attorneys all of the defendants in the said removal proceedings in New York. The said Kellogg having taken a personal part therein in the examination and cross examination of witnesses, and in the general conduct of the proceedings. That in the conduct of said removal proceedings the said Kellogg & Rose admitted in judicio that the proof had established the fact that the profits of said contracts had been divided in thirds, one-third to said Benjamin D. Greene, one-third to said John F. Gaynor, and the other third, in large part, they admitted had gone indirectly to the said Oberlin M. Carter, through an account kept in bank in the name of said R. F. Westcott, from which account said Oberlin M. Carter withdrew the deposits under a power of attorney, held by him from said Robert F. Westcott, while the latter was absent in Europe.

And that the said Kellogg & Rose therein claimed in judicio that said evidence showed that the said R. F. Westcott was a partner with the said Greene and Gaynor in the said Government contracts in the Savannah district. But further claimed that the gift of such proceeds of the contracts by said Westcott to said Oberlin M. Carter was not a crime.

And in so making said claim the said Kellogg & Rose had full notice that the said Greene, the said Gaynor, and the said Carter had

all in said board of inquiry and court-martial proceedings denied that said Robert F. Westcott was at any time interested in said contracts, as a partner with said Greene and Gaynor, or otherwise.

By reason of the aforesaid removal proceedings your orators aver that the said L. Laflin Kellogg was likewise put on full notice of the fraud complained of in this bill.

Your orators aver and charge that in order to prevent your orators from recovering from the said Benjamin D. Greene
28 the large amount of investments into which he had diverted the said money of the United States so fraudulently obtained, the said Benjamin D. Greene set about concealing the same by making other people the holders thereof but secretly for his benefit, and your orators aver and charge on information and belief that among the assets so concealed were and are the assets described on Exhibit F, hereto, as received and handled by the said L. Laflin Kellogg for account of the said Greene, and particularly the said 400 shares of the common stock of the Norfolk and Western Railway Company, certificate numbers 5896, 5897, 5898, 11077, 74200, which shares still stand in the name of the said Laflin L. Kellogg on the books of said railway company. And your orators aver and charge that all of said assets described in Exhibit F were so received by the said L. Laflin Kellogg with full notice of the fraud set forth in this bill, and with full notice that by reason of said fraud the said assets were held by the said Benjamin D. Greene as a trust fund for the benefit of your orators. And your orators aver that the said Kellogg still holds the same or a very large part thereof, and is accountable to your orators therefor, in this proceeding. And especially does the said L. Laflin Kellogg hold the said 400 shares of the common stock of the said Norfolk and Western Railway, the locus of which is within the territorial jurisdiction of this court.

IX.

Forasmuch as your orators can have no adequate relief, except in this court, and to the end, therefore, that the defendants may, if they can show why your orators should not have the relief hereby prayed for, and full, true, direct, and perfect answers make to the matters hereinbefore stated and charged, but not under oath, answers under oath being hereby expressly waived, your orators pray as follows:

(1) That this court will forthwith appoint a temporary receiver to take charge of the aforesaid property within the jurisdiction of this court as hereinbefore set forth until a hearing can be had on rule nisi to be issued in this cause.

And that the court will grant a temporary restraining order restraining the defendants from transferring the said properties or their proceeds or income until a hearing can be had.

(2) That in due course such receiver shall be appointed pendente lite.

29 (3) That the court will in due course by its final decree declare all of the aforesaid investments within the jurisdiction of the court, into which the funds so intrusted to said Oberlin M. Carter as disbursing officer and so fraudulently diverted to the use of said Benjamin D. Greene as aforesaid, in the hands of the defendants and of all persons holding the same for the benefit of said Benjamin D. Greene, or taking the same with notice of the fraud, are together with the income, properties held in trust for orators, and will decree a delivery of the same or proceeds thereof to your orators or a conveyance of the same to your orators, or a sale of the same and the delivery of the proceeds to your orators as the nature of the case and justice may require.

And that your orators may have a personal judgment against the said L. Laflin Kellogg for the amount of all of said trust funds traced to him which he may fail to account for.

(4) That the court will grant a restraining order and injunction in due course restraining any and all parties to this suit, their agents and attorneys, from in any manner conveying away, disposing of, or incumbering pendente lite any of the properties described on Exhibit F to this bill, or the proceeds of the re-investments thereof.

(5) That whenever other and additional persons within the jurisdiction of this court shall become known holding with notice of the fraud any of said properties into which said fund so intrusted to said Oberlin M. Carter, as disbursing officer, has so fraudulently been diverted, and the details of the concealment of said properties shall have been sufficiently developed, that your orators may be allowed to make them parties hereto by suitable amendment with apt allegations and prayers.

(6) May it please your honors to grant unto your orators the court's most gracious writ of subpœna, directed to the said Benjamin D. Greene, at present residing in the city of Quebec, Canada, to the said Luther Laflin Kellogg, residing in the city and State of New York, and to the Norfolk and Western Railway Company, a corporation having its principal office in the city of Roanoke, Virginia.

(7) Inasmuch as the defendants Benjamin D. Greene and Luther Laflin Kellogg are not to be found in the territorial jurisdiction of this court, your orators pray that the court will make a suitable order for service upon them by publication in accordance with the statute in such case made and provided.

30 May it please your honors to grant unto your orators such other and further relief as the nature of their case may require and to the court may seem meet and appropriate.

MARION ERWIN,
Special Asst. to the Atty. Genl.
THOS. L. MOORE,
U. S. Atty. for Western Dist. of Va.,
Complainant's Solicitor.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this 17 day of December, 1903, before the undersigned personally comes Edward I. Johnson, who, being duly sworn, deposes and says that he is a bank examiner by profession; that he has for four years and over been engaged under employment by the United States in working out through the accounts and documents in the engineer's office for the Savannah district, and the accounts of Oberlin M. Carter, Benjamin D. Greene, John F. Gaynor, R. F. Westcott, and others, in the banks and brokers' offices in New York and elsewhere, the details of the fraud set forth in the foregoing bill; that he has read the testimony of the witnesses in the court-martial proceedings therein referred to, and in the proceedings for removal of Benjamin D. Greene et al., therein referred to, and he has read the said bill and is familiar with the facts set forth in said bill, and that the facts therein stated are true to the best of his knowledge, information, and belief.

EDWARD I. JOHNSON.

Subscribed and sworn to before me the 17 day of Dec., 1903.

FREDERICK L. CAMPBELL,
Notary Public, Kings County.

[SEAL OF NOTARY.]

FREDERICK L. CAMPBELL,
Notary Public, Kings Co., 151.
(Cert. filed in N. Y. Co.)

(Endorsed:) In the Circuit Court of the United States for the Western District of Virginia. The United States of America vs. Benjamin D. Greene et al. In equity. Bill, etc. 1903, December 19th, filed. W. M. Mauzy, D. C. Bill. Marion Erwin, special Assistant Attorney General, solicitor for complainant. Thos. L. Moore, U. S. atty. for Western Dist. of Virginia, of counsel.

31 EXHIBIT E.—*Table showing fraudulent profits of contracts divided by thirds between Benjamin D. Greene, John F. Gaynor, and Oberlin M. Carter, and the aggregate of amounts thereof retained by Benjamin D. Greene.*

Contract on which paid.		How divided.				
Number of contract.	Name of contractor.	Amount paid on Carter's disbursing checks divided by thirds.	Number of division.	Date of division.	Share of division retained by B. D. Greene.	Aggregate of amounts retained by B. D. Greene.
4820	Edward H. Gaynor					
4960	Atlantic Contracting Co	38,700.12	2	Jany. 3,1893	12,900.04	12,900.04
4820	Edward H. Gaynor					
4960	Atlantic Contracting Co	48,000	3	Feby. 10,1893	16,000	28,900.04
4820	Edward H. Gaynor					
4960	Atlantic Contracting Co					
5133	do	48,000	4	Mch. 13, 1893	16,000	44,900.04
4960	Atlantic Contracting Co					
5127	do	62,154.34	5	Apl. 14, 1893	20,718.11	65,818.15
4820	Edward H. Gaynor					
4960	Atlantic Contracting Co					
5127	do					
5133	do	45,000	6	May 8,1893	15,000	80,618.15
4820	Edward H. Gaynor					
4960	Atlantic Contracting Co	37,500	7	June 5,1893	12,500	93,118.15
4960	Atlantic Contracting Co					
5253	do					
5254	do	108,000	8	July 11,1893	36,000	129,118.15
4960	Atlantic Contracting Co	39,000	9	Aug. 7,1893	13,000	142,118.15
4960	Atlantic Contracting Co	72,900	10	Sept. 6,1893	24,300	166,418.15
4960	Atlantic Contracting Co	36,000	11	Oct. 10,1893	12,000	178,418.15
4960	Atlantic Contracting Co	18,000	12	Nov. 6,1893	6,000	184,418.15
4960	Atlantic Contracting Co	63,000	13	Dec. 4,1893	21,000	205,418.15
4960	Atlantic Contracting Co	49,500	14	Jany. 8,1894	16,500	221,918.15
4960	Atlantic Contracting Co	54,000	15	Feby. 5,1894	18,000	239,918.15
4960	Atlantic Contracting Co	24,000	16	Mch. 5,1894	8,000	247,918.15
4960	Atlantic Contracting Co	88,853.61	17	July 9,1894	29,617.87	277,536.02
4960	Atlantic Contracting Co	426,150	18	Sept. 10,1894	142,050	419,586.02
4960	Atlantic Contracting Co	63,000	19	Oct. 5,1894	21,000	440,586.02
4960	Atlantic Contracting Co	30,000	20	Nov. 12,1894	10,000	450,586.02
4960	Atlantic Contracting Co					
5811	Anson M. Bangs	24,839.73	21	Dec. 11,1894	8,279.91	458,865.93
4960	Atlantic Contracting Co	28,925	22	Jany. 17,1895	9,641.66	468,507.59
4960	Atlantic Contracting Co	30,000	23	Feb. 4,1895	10,000	478,507.59
5811	Anson M. Bangs	21,212.65	24	Mch. 5,1895	7,070.88	485,578.47
4960	Atlantic Contracting Co					
5811	Anson M. Bangs	69,925	25	Apl. 8,1895	23,308.33	508,886.80
4960	Atlantic Contracting Co					
5811	Anson M. Bangs	27,285.08	26	May 22,1895	9,095.03	517,981.83
4960	Atlantic Contracting Co					
5811	Anson M. Bangs	56,231.43	27	June 7,1895	18,743.81	536,725.64
4960	Atlantic Contracting Co					
5811	A'son M. Bangs					
6049	Wm. F. Gaynor	136,592.08	28	July 5,1895	45,530.69	582,256.33
4960	Atlantic Contracting Co., Capt. G. W. Goethal's check	22,229.97	29	Aug. 5,1895	7,409.99	589,666.32
4960	Atlantic Contracting Co., Capt. G. W. Goethal's check	409.80	30	Sept. 3,1895	136.60	589,802.92
4960	Atlantic Contracting Co	18,100.31	31	May 12,1896	6,033.44	595,836.36
6515	Atlantic Contracting Co					
6517	do	380,075	32	July 6,1897	126,691.67	$722,528.03

(Indorsed:) In the Circuit Court of the United States for the Western District of Virginia. The United States of America vs. Benjamin D. Greene et al. Bill, &c. Exhibit E to the bill. 1903, December 19th, filed. W. M. Mauzy, D. C. Marion Erwin, sp. Asst. Atty. Genl.

EXHIBIT F.—*Certain receipts and reinvestments by L. Laflin Kellogg of funds derived from the securities bought or redeemed by Benjamin D. Greene with diverted funds as per Exhibit E (divisions No. 2 to 32, inclusive) or the proceeds of the reinvestments thereof.*

Checks received, securities sold, and dividends collected.

Date of transaction.	Name of broker through whom transaction made.	Description of transaction.	Amount of proceeds.
October 12, 1898....	Lee Livingston & Co., New York.	Check of Lee Livingston & Co., drawn on Com. Exchange Bank, New York, No. 19264, dated October 12th, 1898, payable to the order of B. D. Greene and transferred to L. Laflin Kellogg.	5,000
October, 1899.....	Lee Livingston & Co., New York.	Check of Lee Livindston & Co., drawn on Com. Exchange Bank, New York, No. 24194, dated October 4, 1899, payable to the order of B. D. Greene and transferred to L. Laflin Kellogg.	15,783.80
March 23, 1900.....	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account L. Laflin Kellogg, 400 shares Delaware, Lackawan'a & Western Railway Company stock, numbers 122324 to 122327, inclusive.	35,791.50
March 23, 1900.....	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, 600 shares Canada Southern Railway Company stock, numbers 24865 to 24873, inclusive.	29,724.50
March 26, 1900.....	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, 100 shares Canada Southern Railway Company stock, number 24874.	4,958.25
April 6, 1900.....	A. W. Kilborne & Co., New York.	Collected through A. W. Kilborne & Co., for account of L. Laflin Kellogg, April, 1900, dividend on 200 shares Southern Railway preferred stock.	300
July 27, 1900.....	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, $5,000 bonds Missouri, Kansas & Texas Railway 2nds 4%, numbers 16533, 15630, 16193, 15815, 15362.	3,443.75
October 16, 1900....	A. W. Kilborne & Co., New York.	Collected through A. W. Kilborne & Co., for account L. Laflin Kellogg, October, 1900, dividend on 200 shares Southern Railway preferred stock.	300
November 1, 1900...	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, $3,000 bonds Missouri, Kansas & Texas Railway 2nds 4%, numbers 15154, 14989, 15118.	1,983.75
April 9, 1901.....	A. W. Kilborne & Co., New York.	Collected through A. W. Kilborne & Co., for account of L. Laflin Kellogg, April, 1901, dividend on 200 shares of Southern Railway preferred stock.	400
April 10, 1901.....	A. W. Kilborne & Co., New York.	Sold through A. W. Kilborne & Co., for account of L. Laflin Kellogg, 200 shares Southern Railway preferred stock. numbers 21319, 21320.	15,746
July 16, 1901.....	A. W. Kilborne & Co., New York.	Collected through A. W. Kilborne & Co., for account of L. Laflin Kellogg, July, 1901, dividend on 490 shares Norfolk & Western Railway Company common stock.	485.10
October 8, 1901.....	A. W. Kilborne & Co., New York.	Collected through A. W. Kilborne & Co., for account of L. Laflin Kellogg, July, 1901, dividend on 10 shares Norfolk & Western Railway Company common stock.	9.90

Reinvestments of proceeds by L. Laflin Kellogg.

Date of reinvestment	Name of broker through whom reinvestment made.	Description of securities bought.	Numbers.	Par value.	Cost.
March 23, 1900.	A. W. Kilborne & Co., New York, for account of L. Laflin Kellogg.	1,000 shares Canada Southern Railway Company stock.	24304, 28383, 24384, 24434, 24476, 24478, 24591, 24655, 24701, 24870.	100,000	$51,775
Transferred into the following numbers and delivered to L. L. Kellogg June 26, 1900			25062 to 25071, inc.		
March 26, 1900.	A. W. Kilborne & Co., New York, for account of L. Laflin Kellogg.	500 shares Norfolk & Western Railway Company's common stock.	100, 100, 100, 2368, 2369, 2370, 100, 10, 25, 298, 10427, 9857, 3, 62, 10225, 5885.	50,000	18,812.50
Transferred into the following numbers and delivered to L. L. Kellogg July 17, 1901, & Nov. 5, 1901			100, 100, 100, 100, 5895, 5896, 5897, 5898, 90, 10, 11077, 74200.		

Indorsed: In the Circuit Court of the United States for the Western District of Virginia. The United States of America vs. Benjamin D. Greene et al. Bill, &c. Exhibit F. to the bill. 1903, December 19th, filed. W. M. Mauzy, D. C. Marion Erwin, Sp. Asst. Atty. Genl.

35 In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE ET AL. } In equity.

The answer of the Norfolk and Western Railway Company, one of the defendants to the bill of complaint of the United States of America, plaintiff:

This defendant, the Norfolk and Western Railway Company, now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says:

1. As to the averments of the sections of the bill numbered I, II, III, IV, V, VI, and VII, this defendant has no knowledge or information sufficient to form a belief, and if deemed material requires proof of the same.

2. As to the averments of the section of the bill numbered VIII, this defendant has no knowledge or information sufficient to form a belief except that this defendant admits that 400 shares of the common stock of the Norfolk and Western Railway Company, and avers that certificates No. C5896, C5897, C5898, 11077 and X74200 were issued, stands on the books of the company, this defendant, in the name of L. Laflin Kellogg.

3. This defendant is not a party to the controversy between the United States as complainant and the other defendants herein as to the title to the above mentioned 400 shares of this defendant's common stock, but submits itself to such order or decree as to this court may seem meet in said cause, and requests that when final order is entered or at such time as the court may deem appropriate, this defendant be allowed its reasonable costs herein.

NORFOLK AND WESTERN RAILWAY COMPANY,
By L. E. JOHNSON, *President.*

Attest:
[SEAL.]

A. J. HEMPHILL, *Secretary.*
F. S. KIRKPATRICK,
Counsel for N. & W. Ry. Co.

36 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

L. E. Johnson, being duly sworn according to law, deposes and says that he is the president of the Norfolk and Western Railway Company, and that the facts stated in the foregoing answer in this cause are true.

L. E. JOHNSON.

Sworn and subscribed before me this 27th day of January, A. D., 1904.

[SEAL OF NOTARY.] HARRY M. KURTZ,
Notary Public.

Commission expires February 27th, 1905.

(Endorsed:) U. S. America vs. Green. Answer of Norfolk & Western Ry. Co. Filed March 18, 1904. Wm. McCauley, clerk.

In the Circuit Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA *v.* BENJAMIN D. GREENE, L. L. KELLOGG, AND the Norfolk & Western Railway Company.	Demurrer.

The separate demurrer of L. L. Kellogg, one of the defendants above named to the bill of complaint of the United States of America, exhibited against him and others in the Circuit Court of the United States for the Western District of Virginia.

This defendant, by protestation not confessing all or any of the matters and things in the said complainants' bill contained, to be true in such manner and form as the same are therein set forth and alleged (or otherwise), says that the same is not sufficient in law to justify or sustain the relief therein sought for in any aspect, and for assignments of grounds of demurrer, he says:

I. According to the statement of the bill there is merely a common law claim against the defendant, Benjamin D. Greene (alone),
37 for money had and received, which, if it have any merit, may be asserted at common law, and it is therefore not a matter of equitable cognizance at all.

II. If the plaintiffs have any right to the shares, and the title of this defendant is invalid as the bill charges, there is a plain remedy by action at law, and resort to equity is inadmissible.

III. According to the statement of the bill, the codefendant, Greene, was in no sense a bailee of funds, but merely a debtor to the plaintiff, and when he collected his pay check, howsoever excessive, and converted it into money, he held it by absolute title, and it is

not susceptible of being earmarked or followed into other hands, or made the object of claim in the hands of third parties.

IV. No trust can be created in money except to the extent of the indebtedness of a party standing in the attitude of a garnishee to the principal debtor, and tho' the bill states inferentially that Greene owned the stocks mentioned in Exhibit F, he evidently purchased them with money in which his title was unimpeachable, the stocks cannot be followed when he transfers those.

V. The bill is fatally defective in not charging that this defendant came illegally or male fide into possession of the 400 shares of Norfolk & Western stock mention in Exhibit F.

VI. The bill does not allege explicitly and exclude the conclusion that the defendant is a bona fide purchaser for value of the said Norfolk & Western stock.

VII. The bill does not negative or exclude the conclusion that the said Norfolk & Western stock was delivered to this defendant bona fide in discharge of an obligation, before notice, suspicion, or knowledge of the alleged fraud of Greene.

VIII. The said Norfolk & Western stock, according to the allegations of the bill, could not be held by Greene "as a trust fund for the benefit of" the complainants.

IX. The said stock, according to the averments of the bill, can not be held by this defendant so as to be "accountable to" the complainants.

X. The bill does not aver that each and every of the various dollars paid to Greene were fraudulently obtained by
38 him, and belonged to the plaintiff, but leaves the conclusion that to some of the money paid him, or money from other sources, had good title in law and morals.

XI. The bill does not specifically charge that the particular 400 shares of Norfolk & Western stock within the jurisdiction of this court and the object of this suit were acquired by fraudulent profits or stolen funds, and does not exclude the conclusion that they were acquired by funds honestly belonging to the said Greene. It does not allege that Greene did not have other money honestly obtained.

XII. The bill does not offer to do equity by allowing the said Greene that to which under a quantum meruit he would be entitled.

XIII. The bill does not offer to do equity by allowing this defendant to claim and retain what he is fully entitled to.

XIV. The bill shows that the complainants have no interest whatsoever in the subject matter involved, the Norfolk & Western stock, and that they are not entitled to implead this defendant in respect thereto.

XV. The bill is defective in not averring that Greene is insolvent and unable to pay the plaintiff's debt and has no assets of his own sufficient to pay.

XVI. It alleges no demand upon and refusal by Greene.

XVII. It alleges no demand upon and refusal by the defendant.

XVIII. Tho' it is alleged in the bill (p. 40) that the stock was received by this defendant with full knowledge of the fraud of "the conspirators," Greene and others, it does not follow that it was held by Greene as a trust fund for the complainants; the fundamental statements of the bill show the reverse.

XIX. The bill does not charge this respondent with intentional fraud.

XX. The bill asks orders restraining the alienation of property, and is fatally defective in not alleging that such alienation would work irremedial loss, or gross injustice, not susceptible remedy in damages.

39 Wherefore, and for divers other good causes, this defendant prays judgment whether he shall be required to make any other or further answer to the said bill.

And he prays to be hence dismissed with his reasonable costs in this behalf sustained.

L. LAFLIN KELLOGG, p. d.

Certificate.

I, John H. Lewis, of counsel for the defendant, L. L. Kellogg, respectfully certify that in my opinion this demurrer is well founded in point of law.

Given under my hand this 3rd day of March, 1904.

J. H. LEWIS.

Affidavit.

I, L. Laflin Kellogg, the defendant above named, being duly sworn, do depose and say that the foregoing demurrer is not interposed for the purpose of delay.

L. LAFLIN KELLOGG.

Subscribed and sworn to before me this 5th day of March, 1904.

[SEAL OF NOTARY.] MACINTOSH KELLOGG,
Notary Public, New York County.

(Endorsed:) United States v. Greene and others. Demurrer of L. L. Kellogg. 1904, March rules, filed (March 7th). W. M. Mauzy, D. C.

In the Circuit Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA
v.
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, AND THE Norfolk & Western Railway Company. | Answer.

The separate answer of L. L. Kellogg to a bill of complaint exhibited against him and others by the United States of America in the

Circuit Court of the United States for the Western District of Virginia.

40 This respondent, L. L. Kellogg, not waiving his demurrer by him heretofore filed, but insisting on the efficiency thereof to dispose of all claim asserted or capable of being asserted against him by the said complainant in the said bill, or otherwise, and saving and reserving unto himself the benefit and advantage of all and all manner of exceptions which can or may be had or taken to the manifold errors, uncertainties, and insufficiencies in the said bill contained, for answer thereto, or to so much and such parts thereof as he is advised it is material he should make answer, answering, says:

I. That this answer is made under oath and is intended to be used at once as an answer, and in season as an affidavit in any sort of proceedings.

II. That he is informed and believes that all the fundamental and material allegations of the said bill are untrue.

III. That he has been informed and believed, and now does believe, that the contracts specified or mentioned in the bill of complaint were properly obtained, and properly and carefully executed in accordance with the specifications, and that the complainants received from the contractors full value for every dollar it paid them on account of said contracts.

IV. That he has been informed by all the parties charged in the bill with having entered into a conspiracy, except Connolly, whom he never saw, that there was no conspiracy, as alleged in said bill, to defraud the United States, or of any other kind; but that the work done by the contractors under the several contracts was properly performed, and that the amount paid was only the stipulated amount mentioned in the contracts.

V. The respondent further says, upon his oath, that the charges in the bill, of knowledge of respondent of any such fraud as alleged or pretended to be alleged in the bill in relation to the making of the contracts, or their execution, is false and untrue; but he affirms that he has never at any time, nor has he now, any such knowledge or notice.

That after these preliminary general denials, which this defendant desires to be made and taken as broad and comprehensive as possible, respondent will take up the specific allegations of the bill, and as to them he says:

VI. That he has information and believes that the first paragraph of the bill, as it appears on page 2 under the heading

41 "Carter's duties, powers, and discretions," in so far as it states who Carter was and what his business was during the time therein mentioned, is true.

"II. That with reference to the specifications of his powers, duties, and discretions following such general statement, respondent says:

That he is informed and believes the following facts are true, namely: That Carter did have certain duty with reference to propos-

ing to his superiors projects for the improvement of rivers and harbors; with reference to proposing projects for the expenditure of moneys for such improvements; with reference to devising and drafting specifications for contracts for such improvements; with reference to drafting and proposing forms of advertisements, giving notice that bids would be received; with reference to proposing to his superiors, as part of the specifications, the time within which the successful bidder should be required to commence work; and with reference to suggesting to his superiors modifications of contracts.

That with reference to each and every one of the last-mentioned items, his power and duty was solely to suggest to his superiors or to propose to them the various matters therein specifically set out.

That in the case of each and every contract mentioned herein, Carter performed such duty; that with regard to the project for improvement, project for expenditure, specifications for contracts, the form of advertisements, the fixing of the time when work should begin, and the modification of contracts, every act of Carter with reference to each and every one of the contracts mentioned in the bill was approved by his superior officer and directions given to him to execute the same, and that the failure on his part to comply with such direction (which was equivalent to a military order), would have rendered him liable to be court-martialed.

That each of these contracts was let upon specifications approved by Carter's superior officers, either the Chief Engineers of the Secretary of War, after advertisement in the form fixed by the Chief Engineers of the Secretary of War, and for the time and in the papers ordered and directed by the superior officers of said Carter.

The defendant is informed and believes the statement to be untrue, and he denies that Carter had power, duty, and discretion in causing to be fixed and fixing the time such advertisements would be published prior to the opening of bids, as alleged in the bill; and, on the contrary, states the fact to be, that he was required by the rules
42 and regulations to send the form of advertisement and a statement of what papers it would be published in and the number of times that the publication would be had to his superior officers for their approval, and that in each and every case of the contracts mentioned in the bill that this was done and the advertisement was published in the papers and for the time fixed by his superior officers.

That Carter did have power, duty, and discretion in giving information in regard to such contracts to be let.

The respondent is informed and believes that in every instance during his entire term of being in charge of the Savannah district he gave out to every person properly entitled thereto all information in regard to the various works or the contracts to be let.

VIII. That with regard to his power, duty, and discretion as to receiving proposals and recommending to his superiors the awarding of contracts; that the statement of the bill is true.

That Carter did receive bids for the contracts mentioned in the bill and did recommend to his superior officer the letting of the con-

tracts to certain parties. That in every instance but one his recommendation was to let the contract to the lowest bidder, and such recommendation was approved by his superior officer. That in the case mentioned the recommendation was not made to the lowest bidder for the reason that such lowest bidder was a failing or defaulting contractor in the performance of contracts with the United States, and, under the law of regulations, was debarred another contract.

That Carter did have power, duty, and discretion with regard to superintending the work being done by contractors in said district, or in approving or rejecting material.

That in the exercise of such power, duty and discretion with regard to the contracts mentioned in the bill, Carter appointed engineers and inspectors upon the work, some of whom have since testified as witnesses for the Government, whose duty and instructions were to carefully watch and inspect the performance of the work under the contract, and to make in writing to Carter, or to the engineer officer at Savannah, reports every ten days of the progress of the work and of the amount of work performed, and as to whether it was done in accordance with the specifications. That the aforesaid inspectors and assistant engineers did so make such reports, and that the same were on file in the office of the engineer at Savannah, and that in each instance it stated that the work was done in accordance with the contract, was signed and certified to by the engineer making it as being true and correct upon his honor.

That Carter did have power, duty, and discretion in approving the accounts for said work under said several contracts.
43 That as a matter of fact, the method of rendering such accounts was that the employees of the engineer officer under said Carter from the beforementioned tri-monthly reports, made computations and calculations of the quantity of work done and performed by the several contractors, and of the amount due them for such work, and notice of such amount then sent to the contractors. That until such report and computation was made and notice given, the contractors did not know and had no means of knowing how much work they had done, or what there was due him or them.

That in the case of each and every contract mentioned in said bill, the account for work done was made as hereinbefore stated, and was correct and true, and based entirely upon the reports of the officers and agents of this complainant; and that the payments made for such work were in accordance with such report, at the rates fixed by the contract, and that the amount paid was only the amount that was due to them for the work actually performed.

IX. The defendant further says that with regard to the second portion of said bill, under the head "The scheme devised to defraud," that the defendant is informed and believes that no part of said portion is true, and he denies it.

That there was no such conspiracy, as alleged therein, to defraud the complainants, or to get the work done at greater prices than should properly have been paid; or that Carter or the persons therein

mentioned in any way during the said times engaged in any conspiracy of any kind or of the character therein set forth and stated.

X. And the respondent further denies on information and belief all that portion of the bill under the head "III," being entitled "The scheme to defraud put in operation," and alleges:

That his information is that there was never any scheme to defraud put in operation, or that cheaper or inferior material and work was done, or work not in accordance with the specifications was allowed or paid for. That, on the contrary, rigid compliance with the specifications was required by said Carter, and carried out by the various contractors.

XI. The defendant further says that with regard to that portion of the bill, under the number "IV," entitled "Description of the engineering work."

That he has no knowledge or information in regard thereto. He has seen or made an examination of most of the contracts mentioned in the bill, but that no such diagrams or drawings as shown
44 by Exhibits "A," "B," "C," and "D" were annexed to said contracts, or made part thereof, but that the same are purely theoretical drawings of what it is contended by enemies of Carter and persons differing with him as to the engineering features of the work, should have been required under these contracts. That as to the theories set forth in this portion of the bill, or as to any alleged fact therein stated as to the cost of the mattresses therein mentioned, or as to the inferences which are sought to be drawn from the statements therein contained, the respondent has no knowledge; but is informed and believes that the theories are wrong, the facts not correctly stated, and the inferences unwarranted.

XII. This defendant further says with regard to that portion of the bill numbered "V," headed "Details of the fraud introduced into and under the contracts," that he avers, upon information and belief, that each and every statement as to alleged facts, if there be any stated in the said portion of the bill down to and including the first six lines on page 23, is untrue, and that there was no such act done for the purpose therein specified, as therein stated, to defraud the United States; but that wherever a change was made from one kind of mattress to another it was done within the contract, for the sole purpose of enabling the work to be done properly, to meet the engineering difficulties of the situation as they presented themselves, and was without fraud or intention to defraud the United States.

That it is true, as this respondent is informed and believes, that certain contracts were let to the parties named; and that as this defendant is informed and believes, the numbers of the contracts in the Savannah district, the date of the contract, and the party who was the contractor is accurately specified and set out in said paragraph at page 23 of the said bill.

This defendant has no knowledge as to whether the allegations of this part of the bill, that these contracts were for the benefit of and

operated by the so-called conspirators, as stated therein, but his information is that Carter and Connelly had no interest therein.

The respondent, however, calls attention to the fact that in none of these contracts as therein set out does co-defendant Benjamin D. Greene appear to be the contractor or to be interested therein; nor is such fact stated in this bill except inferentially.

XIII. This defendant further says upon information and belief and alleges that every statement in the concluding portion of said part of the bill numbered "V," as the same appears on page
45 24 of the bill, is untrue, and they are denied, and he alleges that the complainants were not defrauded; that cheap and inferior material, not in accordance with the specifications of the contracts, was not put in the work; nor were there any payments made to the contractors for such work at high and exorbitant prices, but that the same was only paid for at the contract price, such price being the price approved by Carter's superior officers before the work was changed, and that the work was in all respects properly done and performed.

XIV. The respondent further says that if it be the claim of this bill to connect the said codefendant, Benjamin D. Greene, with the Atlantic Contracting Company, who, it is charged and admitted, was the contractor for the two contracts 6515 and 6517, both dated October 8, 1896; that as this defendant is informed and believes, the fact is with regard to said contracts that said Greene was a stockholder of said Atlantic Contracting Company; that said contracts were properly let and, in so far as permitted by the Government, properly performed; that in the months of July, August, September, and October, the contractor, the Atlantic Contracting Company, was engaged in the performance of said contracts and did a large quantity of work; that the contracts provided that they were not obliged to work in advance of an appropriation, and that some time in October, 1897, there being no appropriation available for payment of work done under these contracts, they suspended work, having earned a large amount of money, which the Government had not paid; that an appropriation became available for the payment of this work on the first day of July, 1898, and that thereafter the said Atlantic Contracting Company demanded payment from the complainants for the work done, which, under the terms of the contract, was then due, and that the said complainants refused to make such payments, thereby committing a breach of the contract between the complainants and the contractor; that prior to that time, and about the month of November, 1896, to the 1st of July, 1897, the said Atlantic Contracting Company had done and performed a very large volume of work under these two contracts, and the Government had retained in its possession (in accordance with the terms of the said contracts) ten per centum (10%) of the amount of work done, and that by reason of the breach of the contract above set forth, on the part of the complainants herein, in refusing to pay the amount that was justly due

and owing to the contractor, this reserved percentage became due and payable.

That about a year after the said breach of the contract, as above set forth, the complainants, in spite of their breach, as above
46 stated, sought to annul said contract by requiring the said contractor to proceed with the work, and on its failure to do so they declared the contract annulled. The said declaration was based not upon any fraud in obtaining the contract or in its performance, but solely because the contractor refused to proceed.

This respondent says further, that thereafter and in January, 1900, the Atlantic Contracting Company, with the defendant's firm as attorneys, duly commenced actions in the Court of Claims to recover from the complainants herein the amount earned by the contractors on the two said contracts, and also profits that they would have earned if allowed to complete the contracts in accordance with their terms, which they were prevented from earning by reason of the breach of the contract as hereinbefore set forth.

That the amount due the said contractor, as appears by the petitions in said Court of Claims, is $359,139.69 for money earned and $600,000 for profits.

That the said actions in the Court of Claims have been diligently prosecuted, and there has been no default or delay on the part of the claimant therein, and that up to the present time no answer has been filed by the United States, the defendant in said actions, and that under the rules of the Court of Claims, the failure to file an answer is equivalent to a general denial on the part of the United States.

That the claimant therein has nearly completed its proof, delayed only by inability so far to obtain certain documents from the complainants.

If the codefendant, Benjamin D. Greene, is to be charged with the receiving of moneys, as alleged in this bill, he should be given credit for the amount due from the Government in these actions, of the Atlantic Contracting Company against the United States, for upon an equitable settlement of the accounts the United States owes the Atlantic Contracting Company, who in this bill is treated as if it were identical with Greene, and therefore owes Greene, instead of Greene owing the Government, the large amount set forth in the bill herein.

XV. This defendant further says that upon information and belief, he denies that portion of the bill numbered "VI," and headed "The division of the money"; but he is informed and believes that Carter, mentioned therein, never received any division of these moneys, but that Robert F. Westcott, who was the father-in-law of Carter, had certain contractual engagements with the contractors, or some of them, and advanced moneys and was paid the same by them, and had some interest in the said contracts.

47 What interest it is of this complainant what was done by the contractors with their money, so long as the contracts were

properly obtained and the work properly done, this defendant is at a loss to understand.

XVI. With reference to the portion of the bill numbered "VII," headed "Greene's investments."

This respondent denies that the amount set forth in the schedule on page 30 states in any way the profits on said contracts received by the said Greene. It will be noticed that nothing is taken into consideration in this part of the bill, nor in any part of it for that matter, of the amount of money necessary to perform the various contracts, or required to be expended for work, labor, and material in its performance; but this bill treats as profits, and alleges to have been divided, the gross amount received from the Government on these contracts.

This defendant denies that these alleged profits, which were paid the contractors, if they came into the hands of Greene, in any constituted in his hands, or in the hands of anybody, with or without notice, a trust fund for the benefit of the complainant.

XVII. The respondent denies specifically that Exhibit "F," purporting to be a table "setting forth certain of the proceeds of said fraudulent profits from the share of the same retained by said Benjamin D. Greene, aggregating $113,926.55, have been traced into the possession of" this defendant.

That as to the Exhibit "F," mentioned by this part of the bill, the respondent will deal with that later in this answer.

XVIII. This defendant further says as to that part of the bill numbered "VIII," headed "The board of inquiry," he has no knowledge or information as to many of the matters therein stated, but that he denies in every way as fully as possible that he ever received any information, or that he now believes that there was any evidence produced before the said board of any kind showing the conspiracy, as alleged therein; that he knows nothing of the reasons that Robert F. Westcott, in that part mentioned, had for not going before said board, but that he was shown the original letter from Westcott, of which the following is a copy:

"RICHFIELD SPRINGS, *October 18, '97.*

"MY DEAR OBERLIN:

"I have your telegram; also telegram from Colonel Gillespie, asking me, as you have done several times, to come before the
48 board to testify. You know my disposition towards you, but do you see any reason—I do not—why I should submit my private affairs to this board, either by furnishing the accounts to which you refer or by being examined personally? I must decline to do so. The account referred to relates to many matters of a private character with which you have had nothing to do. As to matters with which you have had to do, I have given you powers of attorney, as to my moneys and property, under which you have acted for years because of your close personal relations. For the same reason I have given you money for your own use. I under-

stand that those matters have been proven to the board, but I do not see that they are properly within the inquiry or that I should testify about them. As to coming before the board personally, you know that my health is such as to make this hazardous, a consideration which I should put aside if I thought I ought to be examined. The telegram from Colonel Gillespie is a very courteous one. Please explain to him with like courtesy my position.

"Affectionately,

"R. F. WESTCOTT.

"To Captain CARTER."

and was told by Carter and others that the ill health of Westcott and his disinclination to have the board of inquiry pry into his private business matters was the reason of his not going before the board.

XIX. The respondent further says with reference to that part of the said bill beginning on page 34 and continuing down to page 36, under the headings "The court-martial," and "The appeal," that he believes the statements therein, that there was a court-martial, and that Carter was convicted by said court-martial, and there were habeas corpus proceedings had by Carter, and in both the court-martial and the habeas corpus proceedings, the respondent's firm acted as counsel, are true.

That with reference to any other statements therein contained, which in any way charges defendant with any notice or knowledge of any fraud on the part of the contractors or Carter, this defendant denies that there was such notice or knowledge.

XX. That with reference to the review of the evidence by the Attorney General, as stated on page 36, the complainant has omitted to state what the respondent alleges the fact to be:

That shortly after the decision of the court-martial, the evi-
49 dence and decision were referred to Hon. George F. Edmonds, formerly United States Senator from Vermont, by Mr. McKinley, then President of the United States;

That Mr. Edmonds, one of the ablest and most accurate of lawyers, carefully examined the same, and made a report to the President of the United States, and that in and by said report he found, and stated, as his conclusion, that there was not sufficient evidence before the court-martial to warrant their finding Carter guilty of the charges of conspiracy to defraud the United States, as alleged in the charges and specifications before said court-martial, and referred to in the bill.

XXI. The respondent further says with reference to that part of the bill entitled "The indictment of Greene and the Gaynors et al.:"

That it is true, as therein stated, that on or about the 8th day of December, 1899, the grand jury for the Southern District of Georgia found a bill against the parties therein mentioned and named, charging them with a conspiracy to defraud the United States;

That the trial of said indictments was set for the 17th day of March, 1902, and at that time Edward H. Gaynor and William T. Gaynor appeared in court ready for trial, but that the same was not moved, but that the trial was postponed indefinitely;

That sometime in November, 1903, Carter (whose term of imprisonment under said court-martial and decision had expired) was released from Fort Leavenworth, Kansas, where he had been confined, and the Government took no steps to bring him to trial upon said indictment pending against him in the State of Georgia.

XXII. He further says with reference to that part of the bill entitled "The hearing for removal," that the facts with regard to the hearing, the officers before whom it took place, and the proceedings in court are stated with substantial correctness, and that respondent's firm did act for Benjamin D. Greene and John F. Gaynor, therein mentioned.

But this defendant denies that in the conduct of said proceedings the said firm admitted that the proof established the fact that the profits of said contract had been divided into thirds; "one-third to Greene, one-third to Gaynor, and that the other third had gone indirectly to Oberlin M. Carter"; that it was established on said hearing that Robert F. Westcott had, before these contracts were made and while some of them were being performed, been engaged and interested in other business with Greene and Gaynor, or one or both of them; that he had used his efforts to obtain contracts for
50 the doing of work on the Delaware, Lackawanna & Western Railroad Company, with which road he was indirectly connected, in which contracts he was to be interested; that he had furnished to Greene and Gaynor money to pay for the carrying on of the contracts with the United States Government, or some of them; that he admitted having received large sums of money from these contractors at various times.

XXIII. The respondent reiterates his denial that in this removal proceedings, or in any proceeding, he got information sufficient to warrant a belief that there had been any conspiracy to defraud the United States between the parties mentioned, or did he ever have any notice of any fraud upon the Government. The evidence on such proceeding, on the contrary, convinced this respondent that there was no conspiracy, and that the Government was not defrauded of a dollar.

XXIV. He specifically denies that part of the bill in which it is stated,

"Your orators aver and charge that in order to prevent your orators from recovering from the said Benjamin D. Greene the large amount of investments into which he had diverted the said money of the United States so fraudulently obtained, the said Benjamin D. Greene set about concealing the same by making other people the holders thereof, but secretly for his benefit."

In so far as it sought in any way to connect this respondent with the statement, it is denied, and he alleges on information and belief that no such act or acts were done by the said Greene.

XXV. This defendant now desires to take up the Exhibit "F," and to specifically state his connection and relation with the said securities mentioned in said exhibit.

It will be noticed that as to the item Oct. 12, 1898, $5,000, Oct. 1899, $15,783.80, that these sums are alleged to have come into the possession of this defendant long prior to any proceedings, civil or criminal, that were begun against the said Greene, the indictment mentioned having been found in December, 1899.

That immediately upon the receipt of such $5,000 and of the sum of $15,783.80, that he turned the same over to Greene or to such person as he directed, without any knowledge of any fraud or intention to defraud the Government or to deprive it of its property or rights.

51 And the respondent further says that for a long time he was the counsel and personal friend of the aforesaid Benjamin D. Greene; that he had been a man of affairs engaged in the performance of large contracts either as principal, or as financial backer, outside of those mentioned in this bill of complaint, and having no connection with the Government, as, for instance, contracts for building of a tunnel under the East River, contracts for the building, in whole or in part, of a railroad in the Adirondack Mountains, State of New York, contracts for building a sewer system in Orange, in the State of New Jersey; that the respondent knew him to be a man of wealth at the time he first became acquainted with him, which was in or about the year 1892;

That with reference to all the other items mentioned in said Exhibit "F," save and except the Norfolk & Western stock, defendant states and affirms:

That the said Greene for his own convenience carried on a speculative account in the name of defendant with certain brokers in the city of New York, or elsewhere, and that with the assent of this defendant; and that the securities mentioned therein as having been purchased, were purchased on such speculative account or sold, and that defendant had never had them, nor had any interest in them; does not remember to have had possession of them, and has not them now in his possession, the same having been either bought or sold, as the case may be, without ever having been delivered into the possession of defendant, as he remembers it; but if he did have them, or any of them, he has long before the commencement of this suit turned them over to Greene or his order;

That the small items of dividends collected on account of securities held were moneys received by defendant and paid out or disbursed long prior to the commencement of this suit, and for said Benjamin D. Greene or on his account.

XXVI. This defendant further says with reference to the said 400 shares of the Norfolk & Western stock mentioned in said bill:

That at the time of the arrest of said Benjamin D. Greene in December, 1899, he was held to bail in the sum of $25,000; that a friend and client of defendant, one Leary, became surety on the bond for his appearance before the commissioner in the sum of $25,000, on defendant's giving to said Leary a written guarantee to hold him, Leary, harmless from loss or damage by reason of his becoming surety for said Greene;

That at about that time said Greene deposited with defendant some securities for the purpose of indemnifying defendant against
52 loss by reason of his having indemnified said Leary, with the understanding that at any time he desired, he might withdraw the securities so deposited and dispose of them, substituting others in their place; that the securities so deposited were also to be held by the respondent to secure him for the fees and disbursements that might be incurred by him, or his firm, in defending said Greene, or in caring for his interests in any proceedings brought by the United States against him, or in any other matters, there being several matters of litigation, in which said Greene was interested, pending in the respondent's office;

That from time to time the securities so deposited were withdrawn by Greene and others substituted in their place, and that the Norfolk & Western stock, now in defendant's hands, are securities that the defendant deposited or substituted in place of those originally deposited, and the respondent now avers that he holds said Norfolk & Western stock as a bona fide holder, as security for the obligation that he is under to the said Leary by reason of his having become surety on said bond, or by reason of the said Leary having gone upon another bond for the sum of $40,000 for Greene's appearance in the State of Georgia after the conclusion of the said removal proceedings, the agreement to indemnify Leary having been extended to cover said last-mentioned bonds, and also to secure the payment to the respondent, and to his firm, of the various sums of money that he has advanced and for services rendered for said Greene in various matters since that time.

The respondent further says that he is informed and believes and charges the truth to be that the said Greene is amply responsible financially to meet and to pay any judgment that may be obtained against him by the United States in a suit brought to recover moneys wrongfully or fraudulently obtained by him.

He further says that he personally is amply responsible financially to meet and pay any judgment that may be recovered by the United States against him for the value of the said 400 shares of Norfolk & Western stock, if the Government should sue him, and recover such value in an action at law.

XXVII. Moreover, this defendant denies all and singular the allegations and insinuations in the said bill of complaint contained,

except alone in so far as the same are herein specifically and expressed admitted.

And having fully answered he prays to be hence dismissed with his reasonable costs by him about his defense expended.

And he will ever pray, &c., &c.

L. LAFLIN KELLOGG.

JOHN H. LEWIS, p. d.

53 STATE OF NEW YORK,
Borough of Manhattan,
City and County of New York, ss:

I, Luther Laflin Kellogg, whose name is signed to the annexed bill, which is also in the form of an affidavit for use in the said cause, being first duly sworn, do depose and say that the matters and things contained in the foregoing answer (and affidavit), so far as made of my own knowledge are true, and so far as made upon knowledge or information derived from others, I believe them to be true.

Given under my hand this 1st day of March, 1904.

LUTHER LAFLIN KELLOGG.

Subscribed and sworn to before me this 1st day of March, 1904.

[SEAL.] THOS. A. HEALY,
Notary Public 192, New York County.

(Indorsed:)

In the Circuit Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA
v.
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk & Western Railway Company.

Answer.

Filed Mch. rules, 1904 (Mch. 7th). W. M. Mauzy, D. C., attorneys for , 120 Broadway, borough of Manhattan, New York City.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

54 At a term of the Circuit Court of the United States for the Western District of Virginia, continued by adjournment from June 1st, 1904, and held at Lynchburg, on Thursday, the 2nd day of June, A. D. 1904.

Hon. Henry C. McDowell, judge.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE ET AL.

This cause came on to be further heard and was argued by counsel, upon consideration whereof it is adjudged, ordered, and decreed:

1st. That the demurrer of defendant, L. L. Kellogg, to the bill of complaint be, and the same is hereby, overruled.

2nd. That the motion of said defendant that the injunction heretofore awarded in this cause be vacated, be and it is hereby overruled. And it is ordered that said injunction be continued and kept in force until the further order of the court.

3rd. The answer of said defendant having been filed, it is ordered that complainant be allowed until the first Monday in July, 1904, to file exceptions or replications thereto.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

At a term of the Circuit Court of the United States for the Western District of Virginia, continued by adjournment from June 3rd, 1904, and held at Lynchburg, on Wednesday, the 15th day of June, 1904.

Hon. Henry C. McDowell, judge.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE ET AL. } In equity. Bill, &c.

It appearing to the court that at the time of the passage of the order of this court of June 2nd, 1904, the fact that the complainant had already filed replications to the answers of defendants was overlooked.

It is ordered by the court that the said replications shall stand as if filed at the July rules, 1904, so that the time for taking testimony in said cause shall begin to run from said July rules, 1904.

55 In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE ET AL. } April rules, 1904.

The replication of the above named complainant to the answer of L. Laflin Kellogg, defendant in the above stated cause.

This replicant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto sayeth that it does and will ever maintain and prove its said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and that the

answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly as in and by its said bill it has already prayed.

MARION ERWIN,
Special Assistant to the Attorney General,
Complainant's Solicitor.

(Endorsed:) United States vs. Benjamin D. Greene et als. Replication to answer of L. Laflin Kellogg. Filed April 4, 1904. Wm. McCauley, clerk. Ent'd O. B. 3, page 158.

In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk and Western Railway Company, defendants.

The petition for leave to intervene and the bill of intervention therefor of Mary C. Leary, administratrix of the goods, chattels, and credits of James D. Leary, late of the city, county, and State
56 of New York, deceased, exhibited against the United States of America, Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk and Western Railway Company.

Mary C. Leary, of the city, county, and State of New York, as administratrix of the goods, chattels, and credits of James D. Leary, late of said city, county, and State, deceased, brings this her petition for leave to intervene herein, and presents this as her bill of intervention, leave thereto being first had, and thereupon such petition shows:

To the judges of the Circuit Court of the United States for the Western District of Virginia, sitting in equity:

Mary C. Leary, of the city of New York, and a citizen of the State of New York, in her capacity as administratrix of the goods, chattels, and credits of James D. Leary, late of said city and State, deceased, brings this her bill of intervention against all of the parties to this action, and thereupon the intervenor complains and says:

First. That on or about the 8th day of September, 1899, in the District Court of the United States for the Southern District of Georgia a true bill of indictment was returned to said court by a

grand jury of the United States, duly empanelled and sworn, against the above named defendant Benjamin D. Greene and certain other defendants, charging them with conspiracy to defraud the United States by and through a certain scheme to defraud, substantially as set forth in the bill of complaint in this action.

Second. That thereafter and on or about the 11th day of December, 1899, the said Benjamin D. Greene was arrested in the city of New York upon a warrant issued by John A. Shields, United States commissioner for the Southern District of New York, based on said indictment, and was held in the sum of $25,000 bail to await a warrant of removal from the District Court for the Southern District of New York remanding said Greene to the State of Georgia for trial.

Third. Thereupon the said Greene, either personally or through the meditation of the above named defendant, Luther Laflin Kellogg, who was said defendant's attorney, applied to the intervenor's decedent, James D. Leary, to become the bondsman of said Greene upon said bail bond, and said Leary consented to become such bondsman and did sign and execute a bail bond in the said sum of $25,000, and the said Greene at the same time placed in the hands of his said attorney, Luther Laflin Kellogg, the defendant above
57 named, as trustee and depositary, to secure said Leary against any loss which he might sustain by reason of his becoming such bondsman, three hundred shares of the capital stock of the Delaware, Lackawanna and Western Railroad Company, upon the condition and understanding that said Kellogg should hold said shares of stock in trust for said Leary until said Leary was released from said bond, or in case that said Leary's liability thereon should be established that said shares of capital stock should be applied in payment of the obligation assumed by said Leary. Thereafter said shares of stock were withdrawn by said Greene from the custody of said Kellogg, and said Greene deposited with said Kellogg in lieu thereof four hundred (400) shares of the common stock of the Norfolk and Western Railway Company (being the shares referred to in the bill of complainant) to be held by said Kellogg upon the same terms and conditions as those upon which said Delaware, Lackawanna and Western stock was originally deposited with him. Said shares of Norfolk and Western Railway stock are still held by said Kellogg, as such trustee and depositary aforesaid.

Fourth. Thereafter such proceedings were duly had in the said District Court of the United States for the Southern District of New York and in the District Court of the United States for the Southern District of Georgia as that the trial of said indictment was set for the 17th day of March, 1902, in the said District Court of the United States for the said Southern District of Georgia. On or about the 28th day of May, 1901, a warrant was duly issued by the district judge for the Southern District of New York directing the removal of the said defendant Greene to the State of Georgia

for trial upon the aforementioned indictment, and thereupon said Benjamin D. Greene was admitted to bail in the sum of $40,000 for his appearance in Georgia for trial upon said indictment.

Fifth. That thereupon said Benjamin D. Greene and his said attorney, Luther Laflin Kellogg, applied to the intervenor's intestate, James D. Leary, to become surety upon said bail bond of $40,000, which the said James D. Leary agreed to do upon the condition and understanding that the securities held in trust or on deposit as heretofore alleged by the defendant Luther Laflin Kellogg should remain and continue in the hands of the said Luther Laflin Kellogg as security and indemnity to the said James D. Leary for signing said bail bond of $40,000 for the appearance of said Greene in Georgia for trial upon said indictment.

Sixth. That upon such understanding and agreement the said James D. Leary, the intervenor's decedent, did on or about
58 the 20th day of January, 1902, jointly with the defendant Benjamin D. Greene, make, execute, and deliver an obligation and recognizance in words and figures following, to wit:

"UNITED STATES OF AMERICA,
"*Southern District of New York.*

"Be it remembered that on this twentieth day of January, in the year of our Lord, nineteen hundred and two, before me, John A. Shields, one of the commissioners duly appointed by the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to take acknowledgments of bail and affidavits and also to take depositions of witnesses in civil causes pending in the courts of the United States, pursuant to the provisions of the acts of Congress in that behalf, personally came Benjamin D. Greene, of Stamford, Connecticut, principal, and James D. Leary, of 43 East 25th Street, New York City, N. Y., surety, and severally acknowledged themselves to owe to the United States of America, that is to say, the said Benjamin D. Greene the sum of forty thousand dollars, and the said James D. Leary the sum of forty thousand dollars, separately to be levied and made of their respective goods and chattels, lands and tenements to the use of the United States if default shall be made in the condition following, to wit:

"Whereas the said Benjamin D. Greene has been charged on oath before John A. Shields, one of the commissioners duly appointed, as aforesaid, with having on the 1st day of January, 1897, together with John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connolly, and Oberlin M. Carter, unlawfully, knowingly, and feloniously amongst themselves and divers other persons unknown, conspired, confederated, and agreed to defraud the United States of America of divers large sums of money by means of a certain fraudulent scheme devised by the said parties, and with having conspired to present false accounts to an officer of the United States, as will more fully appear by the complaint made before the

said John A. Shields, commissioner, the complaint of Clarence S. Houghton, assistant United States attorney for the Southern District of New York, to which complaint reference is hereby made, and that the said offense was committed within the Eastern Division of the Southern District of Georgia, and that the said Benjamin D. Greene and others had been indicted by grand jury of said district for said offense, and that the said Benjamin D. Greene was then at the time of making the said complaint within the said Southern District of New York; and upon such charge being made, as
59 aforesaid, the said John A. Shields did issue his warrant in due form of law for the arrest of said Benjamin D. Greene; and whereas the said Benjamin D. Greene has been brought before the said John A. Shields, one of the commissioners aforesaid, to answer to the said charge, and witnesses having been duly examined in relation of said charge in presence of said Benjamin D. Greene, and upon such examination, it appearing to the said commissioner that the offence with which the said Benjamin D. Greene stood charged had been committed, and that there was probable cause to believe the said Benjamin D. Greene to be guilty thereof, and the said commissioner having held the said Benjamin D. Greene to await a warrant of removal by the United States district judge, and the said United States district judge having heard application for said warrant of removal, and having on the 28th day of May, 1901, issued such warrant to the United States marshal for the Southern District of New York for the removal of said Benjamin D. Greene to the Southern District of Georgia for trial in the District Court of the United States for the Eastern Division of the Southern District of Georgia, and the said marshal having taken the said Benjamin D. Greene into his custody under said warrant, and the said Benjamin D. Greene having on May 28th, 1901, presented to the Circuit Court of the United States for the Southern District of New York his petition for writ of habeas corpus, which application was by said Circuit Court denied; and the said Benjamin D. Greene having prosecuted an appeal to the Supreme Court of the United States from said order denying the said application for said writ of habeas corpus, and the said Circuit Court having allowed said Benjamin D. Greene to be enlarged on bail pending said appeal; and the said Supreme Court Court having on the 6th day of January, 1902, affirmed said order of said Circuit Court denying said application for habeas corpus, and the mandate of said Supreme Court having been filed in said Circuit Court, and the judgment of said Supreme Court having on the 17th day of January, 1902, been made the judgment of said Circuit Court, and the said Benjamin D. Greene having by an order of said Circuit Court surrendered himself to said marshal under said warrant, for removal to Georgia for trial, and the said Benjamin D. Greene now tendering bail for his appearance in Georgia for trial as aforesaid:

"Now, therefore, the condition of this recognizance is such, that if the said Benjamin D. Greene shall personally appear at the term

of the District Court of the United States for the Eastern Division of the Southern District of Georgia, to be holden on the second Tuesday in February, 1902, and from day to day and from term to term, should the case be continued, and then and there to answer to
60 such matters and things as have or shall be objected against him, and to stand to, abide and perform the orders of the court, and not depart the said court without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

"B. D. GREENE. [SEAL.]
"JAMES D. LEARY. [SEAL.]

"Acknowleged before me the day and year first above written.

"[SEAL OF COMMISSIONER.] JOHN A. SHIELDS,
"*United States Commissioner for the*
"*Southern District of New York.*

"SOUTHERN DISTRICT OF NEW YORK, *ss:*

"James D. Leary, being duly sworn, deposes and says that he is worth the sum of eighty thousand dollars, over and above all his just debts and liabilities.

"JAMES D. LEARY.

"Sworn to before me this 20 day of January, 1902.

"[SEAL OF COMMISSIONER.] JOHN S. SHIELDS,
"*U. S. Commissioner for the*
"*Southern District of New York.*

"Approved.

"E. HENRY LACOMBE,
"*U. S. Circuit Judge.*"

which said recognizance after such execution and delivery was duly approved by Hon. E. Henry Lacombe, one of the judges of the Circuit Court of the United States for the Southern District of New York.

Seventh. The trial of the said Benjamin D. Greene upon said indictment was reached in the District Court of the United States for the Southern District of Georgia at the February term, 1902, and no leave to depart the court was given to said Greene.

Eighth. That on the 6th day of March, 1902, in the United States court room in the city of Savannah, Georgia, the said Benjamin D. Greene was duly called to abide the order of said court on said
61 indictment, but failed to appear, and it was thereupon ordered by the court that said defendant Greene be given until 10 o'clock a. m. of March 7, 1902, to appear and abide the order of the court and that he do appear at that time to come into the said court room and abide the order of the court in the premises.

Ninth. That thereafter, to wit, at the said February term, 1902, of said District Court and on the 7th day of March, 1902, at ten o'clock a. m., in the United States court room in the city of Savannah the

said Benjamin D. Greene was duly called to come into court to answer the charges pending against him on said indictment and stand and abide by the orders of the court in the premises, but the said Benjamin D. Greene made default and thereupon a judgment was entered by the court on said obligation and recognizance forfeiting the same and adjudging that the United States of America recover against said Greene and said Leary, jointly and severally, the sum of $40,000, unless at the next term of court they should show cause why such order should not be final.

Tenth. That the said Benjamin D. Greene did not at any time thereafter appear in said District Court of the United States for the Southern District of Georgia and show cause why the said judgment and an award of execution which had been made thereon should not be final; so that on the 12th day of January, 1903, the said court duly rendered final award of execution upon said judgment.

Eleventh. That on or about the 11th day of April, 1902, said James D. Leary departed this life intestate, and afterwards, to wit, on the 21st day of April, 1902, the intervenor, his widow, was duly appointed administratrix of his goods, chattels, and credits by the surrogate of the county of New York, State of New York, and letters of administration having been granted to her, she duly qualified as such administratrix, and is now serving and acting as such.

Twelfth. That on or about the 10th day of September, 1903, the United States of America brought suit against the intervenor in the Circuit Court of the United States for the Southern District of New York upon said recognizance of $40,000 above referred to, to recover the amount thereof; that such proceedings were duly had in said court as that a judgment was entered in said court on or about the 6th day of January, 1908, in favor of the United States of America and against the intervenor upon said recognizance for the sum of $35,377.46, which said judgment has not been paid, set aside
62 or reversed, and which said judgment the intervenor is therefore liable to be compelled to pay upon execution issued thereon.

Thirteenth. That the said four hundred (400) shares of Norfolk and Western stock together with the accumulated dividends thereon are not of sufficient value to pay the said judgment against the intervenor, the same not being of greater value than thirty-four thousand dollars ($34,000).

Fourteenth. Notwithstanding that the plaintiff in this suit has obtained an order restraining the defendant Luther Laflin Kellogg from devoting the said shares of Norfolk and Western Railway stock to the uses for which they were deposited with him and from delivering them to the intervenor so that she might use them or their proceeds in liquidating the judgment obtained against her in the Southern District of New York upon said recognizance of $40,000, the plaintiff is pressing the collection of said judgment against the intervenor and is taking steps in the surrogate's court of New York

County to obtain an order directing execution to issue against the intervenor.

Fifteenth. By reason of the premises the intervenor alleges that the defendant Luther Laflin Kellogg holds the securities mentioned in the bill of complaint herein and the dividends thereon, as trustee or depositary for, and for the benefit and protection of, the intervenor, and that intervenor's claim upon and right to said securities is not liable to the claim of the plaintiff herein except to the extent of any surplus remaining after making full indemnity to the intervenor.

Wherefore, the intervenor now prays that each and all of the original parties to this suit may be ordered to enter an appearance to this intervening bill and to show cause why the intervenor's claim should not be held to be valid and just and be allowed by the court, and that in the said order to show cause the plaintiff and the defendants may each be cited to appear herein and answer this intervening bill, though not under oath, oath or affirmation thereto by any of the said parties being hereby expressly waived, and the intervenor prays that upon the hearing of the intervenor's bill a decree may be entered decreeing to the intervenor such relief as upon this bill and the answers thereto and on file herein it may be meet and equitable that she should have.

MARY C. LEARY, *Intervenor.*
J. D. HORSLEY, *Solicitor for Intervenor.*

63 UNITED STATES OF AMERICA,
Southern District of New York.

Mary C. Leary, being first duly sworn, says that she is the intervenor herein; that she is the administratrix of the goods, chattels, and credits of James D. Leary, late of the county and State of New York, deceased; that she has heard the foregoing petition read and knows the contents thereof and that the statements therein contained are true, as she believes.

MARY C. LEARY.

Sworn to before me and subscribed in my presence by the above-named Mary C. Leary this eighth day of April, 1908.

[SEAL.] CHARLES PLATNER,
Notary Public 509, New York County.

STATE OF NEW YORK,
County of New York, ss:

I, Peter J. Dooling, clerk of the county of New York and also clerk of the Supreme Court for the said county, the same being a court of record, do hereby certify that Charles Platner, before whom the annexed deposition was taken, was, at the time of taking same, a notary public of New York, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well ac-

quainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 11th day of Apr., 1908.

[SEAL.] PETER J. DOOLING, *Clerk.*

64 (Indorsed:)

In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA, PLAINTIFF,
against
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk and Western Railway Company, defendants.

(Original.) Petition for leave to intervene and bill of intervention. David McClure, J. D. Horsley, attorneys for petitioner, 22 William Street, New York. Filed April 18th, '08. W. M. Mauzy, D. C.

In the Circuit Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk and Western Railway Company, defendants. } In equity.

Now, on this day there is exhibited to the court the proposed bill of intervention of Mary C. Leary, administratrix of the goods, chattels, and credits of James D. Leary, late of the city, county, and State of New York, deceased, against the complainant in this suit, the United States of America and Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk & Western Railway Company, the defendants in this suit, with the petition of said Mary C. Leary, administratrix as aforesaid, praying for leave to intervene under the said bill and file the said bill of intervention as such and for an order to show cause against said petition being filed and the prayer thereof being granted, and that the aforesaid plaintiff and the aforesaid defendants may each be cited and required to appear and answer said intervening bill.

And thereupon it is ordered that the United States of America, the plaintiff in this suit, and Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk and Western Railway Company, the defendants in this suit, being each served ten days prior to May 30,

1908, with a copy of this order and of said petition for leave to intervene and file the said bill of intervention and of the said
65 bill of intervention, do show cause on the said thirtieth day of May, 1908, at the United States court in Lynchburg, Virginia, against the granting of leave to file said petition and the granting of the prayer of said petition.

It is further ordered that the service of a copy of this order, together with a copy of said petition and of said intervening bill, upon Thomas Lee Moore, one of the solicitors of record for the United States of America, the complainant in this suit, shall be sufficient service upon the United States of America to entitle the court to proceed herein and to adjudicate upon the filing of said petition and the prayers thereof.

And it appearing satisfactorily to the court that the said Luther Laflin Kellogg and the said Benjamin D. Greene are not residents within and cannot be found in the Western District of Virginia, it is ordered that a copy of this order, together with a copy of said petition, and of the said intervening bill, be served upon the said Luther Laflin Kellogg or Abram J. Rose, one of his solicitors of record, and also upon Benjamin D. Greene, if practicable, wherever they may be found; and such service of copies shall be sufficient service to entitle*d* the court to proceed herein and to adjudicate upon the filing of said petition and the prayers thereof.

HENRY C. MCDOWELL, *Judge.*

April 17, 1908.

(Endorsed:) U. S. vs. Benj. D. Greene et als. Decree on ptn. of intervention. Filed April 18, '08. Entd. O. B. p. 337.

In the Circuit Court of the United States for the Western District of Virginia.

UNITED STATES OF AMERICA *vs.* BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk and Western Railway Co.	In equity. Bill, etc.

Petition of Mary C. Leary, administratrix, for leave to file intervention and rule nisi thereon. Demurrer and motion of United States to strike petition and intervention.

And now comes the United States, by Marion Erwin, special assistant to the Attorney General, and Thomas L. Moore, U. S. attorney, and for response to said rule nisi, and showing cause why the said court should not allow said intervention of Mary C. Leary, administratrix, to be filed, say:

66 (1) That it appears from the record and proceedings of said cause, in which the said Mary C. Leary, administratrix of James D. Leary, deceased, seeks to intervene, that the said 400

shares of Norfolk & Western Railway Company stock, which is sought by said intervention to subject to the claims of said Mary C. Leary, adminsitratrix, constitute in equity and good conscience a trust fund belonging to the United States and which at the time of the accruing of the alleged claim thereto of the said James D. Leary and of Mary C. Leary, administratrix, and ever since has constituted a trust fund belonging to the United States, and that as against the said Benjamin D. Greene and every one holding under him not a bona fide purchaser for value without notice, the right to intervene in said suit and to set up adverse claims to the United States in, of, or to said stock has been cut off by the decree pro confesso taken in said cause against said Benjamin D. Greene.

(2) That it is nowhere in said petition of Mary C. Leary, or in her said proposed intervention, set up that she is a bona fide purchaser for value in, or, or to, or in respect to said stocks, as against the rights of the United States therein as set up in the bill of complaint in said cause.

(3) That it appears from the said petition that the only claim or right which the said Mary C. Leary, administratrix, proposes to set up in her said intervention is an oral promise or understanding between the said James D. Leary and Benjamin D. Greene, made through the latter's attorney, L. L. Kellogg, that said 400 shares of stock should be held by said L. L. Kellogg to indemnify said James D. Leary in case said James D. Leary should be compelled to pay an obligation of $40,000 on a recognizance entered into by him as a surety for the appearance of said Benjamin D. Greene to answer to an indictment in a criminal case, which recognizance was forfeited and judgment entered thereon against the administratrix of said James D. Leary, and it therefore appears that the said alleged implied contract under which it is claimed by said administratrix that she has an interest in said stock is: (a) Not in writing, and therefore it cannot be enforced under the statutes of frauds. (b) Whether in writing or not the said alleged implied contract is against
67 public policy and void, and cannot be enforced as against the United States in this proceeding, and said Mary C. Leary has no standing in a court of justice to enforce said alleged contract.

(4) That the said intervention is in matter of form and substance without equity.

(5) That the said Mary C. Leary, administratrix, is in laches in not having presented said petition at an earlier stage of the proceedings, and it is now too late.

(6) Wherefore this respondent prays judgment that the said petition for leave to intervene be denied, and that said intervention be dismissed and stricken.

MARION ERWIN,
Special Asst. to the Atty. Genl.
THOS. L. MOORE,
U. S. Atty. for W. Dist. Va., Compls. Solrs.

Marion Erwin, being duly sworn, deposes and says that the matters stated in the foregoing response and demurrer are in his opinion well founded in law, and that the same is not interposed for delay.

MARION ERWIN.

Subscribed and sworn to before me this 30th day of May, 1908.

W. M. MAUZY, *D. Clk.*

(Indorsed:) In the Circuit Court of the United States for the Western District of Virginia. United States of America vs. Benj. D. Greene, L. L. Kellogg, & Norfolk & Western Ry. Co. In equity. Bill, &c. Response of United States to petition of Mary C. Leary, admx., for leave to file intervention. Filed May 30, '08. McD.

68 In the United States Circuit Court for the Western District of Virginia, continued and held at Lynchburg, in and for said district, on July 20, 1908.

UNITED STATES OF AMERICA
v.
BENJAMIN D. GREENE ET AL. } In equity.

This cause having come on to be heard on the petition of Mary C. Leary, adm'x, for leave to file her bill of intervention exhibited therewith in this cause, and on the objection of the complainant herein to granting such leave, was argued by counsel. Upon consideration whereof, for reasons set out in an opinion now filed, it is adjudged, ordered, and decreed that said petition be overruled, and that leave to file said bill of intervention be, and is hereby, denied.

(Indorsed:) United States v. Benj. D. Greene et al. Order. July 20, 1908. Enter: Henry C. McDowell, district judge. Entered & filed July 20, 1908. S. W. Martin, clerk. Ch. O. B. #3, p. 355.

UNITED STATES
v.
BENJAMIN D. GREENE ET AL. } In equity.

Opinion.

The petition of the administratrix of Jas. D. Leary for leave to file a bill of intervention herein is objected to by the Government.

The bill of intervention does not deny the allegations in the original bill to the effect that the Norfolk & Western stock was purchased with funds embezzled from the Government, nor does it allege that Leary, at the time of the alleged agreement of indemnity, was innocent of knowledge of the facts which are alleged in the original bill and which impress upon the stock a trust in favor of the Government. In this failure of allegation the bill of intervention seems to

me to be fatally defective. However, as the pleading may be amended in this respect, it will be necessary to go further.

I find myself unable to determine from the bill whether the draftsman is setting up an express agreement that the securities were to be used to indemnify Leary, or a tacit and therefore merely a
69 supposed implied agreement. As uncertainties in pleadings are to be construed against the pleader, we must for the present regard the pleading as alleging a tacit, unexpressed intention, which, but for a rule to be mentioned later, would from the acts done and the circumstances create the implied agreement relied upon. I think it is settled, and counsel seems to concede it, that the law will not imply an obligation on the part of the principal in a bail bond in a criminal case to indemnify his surety. See 3 Am. & Eng. Ency. (Ed ed.), 684; Highmore on Bail, p. 204; U. S. v. Simmons, 47 Fed., 575; U. S. vs. Ryder, 110 U. S., 729. And to the extent stated I regard the last case cited as a binding decision.

But here again the bill of intervention may be amended. Although verified, the ambiguity of the pleading may be but the imperfect execution of his task by the draftsman. Assuming then that the bill of intervention may be so amended as to unequivocally allege an express agreement between Greene and Leary that the securities deposited with Kellogg were to be used to indemnify Leary, let us consider if there would be shown a right on the part of the proposed intervener to any relief.

The reason why there is no implied obligation on the part of a principal in a bail bond in a criminal case to indemnify his surety is that such a contract is against public policy in that it "gives the public the security of one person only instead of two." As applied to an express contract by the principal to indemnify his security (and as distinguished from a contract by a third person to indemnify the security) it seems to me that the reason for the rule operates quite as strongly to invalidate such express contract as it does to deny the existence of an implied contract. An express contract by the principal in a bail bond in a criminal case to indemnify his surety at least as certainly gives the public the security of only one person instead of two, as would an implied contract to such effect.

Where the contract of indemnity is made by some third person, and not by the principal, the public still has the security of two persons. While in the case of U. S. v. Ryder, supra, the fact that the indemnitor was not the principal in the bail bond in the case of Chipps v. Hartnoll, 4 B. & S. 414, was not adverted to, this distinction is of importance. See 16 Am. & Eng. Ency. (2d ed.), 172, where the result of numerous decisions is thus stated:

"In reference to a contract to indemnify a person on account of his becoming bail for a prisoner charged with a criminal offense, the best rule would seem to be that such a contract is illegal as
70 against public policy where it is entered into by the prisoner himself, but valid and enforceable if persons other than the prisoner are the indemnitors."

In 3 Am. & Eng. Ency. (2d ed.), 684, it is said:

"For obvious reasons of public policy the law will not imply an obligation, nor will it enforce an express agreement, on the part of the principal, to indemnify his bail against the amount of penalty incurred by his default."

Such seems to me to be the necessary conclusion.

In the contention of counsel for the proposing intervenor to the effect that the Government cannot rely upon the illegality of the agreement between Greene and Leary, I am able to see merit. No court will lend its aid to enforce an illegal contract, and here it is the beneficiary under such a contract that moves the court to act. The case of U. S. v. Ryder, supra, is here again incidentally in point. In that case on the objection of Ryder, representing creditors of the defaulting principal in the bail bond, the court refused to subrogate the sureties in the bail bond *of* to afford them any relief.

As the contract between Greene and Leary, however pleaded, cannot be other than illegal and unenforceable, my conclusion is that leave to file the petition of intervention should be denied.

HENRY C. MCDOWELL, *District Judge.*

July 20, 1908.

(Indorsed:) U. S. vs. Benj. D. Greene et al. Opinion. Filed July 20, 1908. S. W. Martin, clerk.

In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA, COMPLAINANTS,
vs.
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, AND THE NORFOLK & WESTERN RAILWAY COMPANY, defendants. } In equity.

Stipulation.

Whereas, Mary C. Leary, as administratrix of James D. Leary, deceased, has taken an appeal to the U. S. Circuit Court
71 of Appeals for the 4th Circuit from a decree rendered in the above stated cause on the 20th day of July, 1908, by the said Circuit Court overruling her petition for leave to file a bill of intervention and denying leave to file said intervention, and, whereas it is desired to shorten the transcript of the record on said appeal as much as possible: It is therefore stipulated between the undersigned as follows:

That the following portions of the record together with this stipulation are sufficient to show the alleged errors complained of, and is all that need be copied into the transcript on appeal and for printing:

(1) The bill in the original suit, together with Exhibits E and F thereto, shall be copied into the transcript, but the Exhibits A, B, C, and D thereto shall be omitted.

In lieu of Exhibits A, B, C, D to the bill it is admitted for the purposes of this appeal that the allegations of the bill, in regard to the means by which the engineering work was conducted so as to accomplish the frauds charged, shall be taken as sufficiently averred and charged in the bill.

(2) It is stipulated that on the filing of the bill December 19, 1903, equity subpœnas were duly issued thereon directed to the said defendants to the bill. Personal service of the subpœna and a rule nisi for injunction was made upon the Norfolk & Western Railway Company, and return on subpœnas having been made by the marshal that the defendants Benjamin D. Greene and L. L. Kellogg were not found in the district, an order was made in terms of the statute requiring them respectively to appear, demur, plead, or answer to the bill on or before March rules, 1904, and directing publications of the same and service of a copy of said order on the said non-resident defendants wherever found, as provided by the statute in such case made and provided. Said publication was duly made, and personal service of said order was made upon said L. L. Kellogg and also upon said Benjamin D. Greene on January 18, 1904.

That said Benjamin D. Greene failed to appear, demur, plead, or answer to said bill, at the time designated in said order or at any other time, and in due course, to wit, at April, 1904, rules of said court, a decree pro confesso was duly entered in said cause against the said Benjamin D. Greene.

The foregoing matters in this paragraph stated shall be taken as admitted without the necessity of copying the orders,
72 processes, and returns and entry of decree pro confesso into the transcript of this appeal.

(3) It is further stipulated that the Norfolk & Western Railway Company filed its answer to the bill admitting the fact that the 400 shares of its common stock in controversy stood on its books in the name of L. L. Kellogg and submitted itself to the jurisdiction of the court. This answer will be copied into the transcript.

(4) It is further stipulated that the rule nisi for an order to restrain pendente lite the Norfolk & Western Railway Company from transferring said 400 shares of its stock or paying dividends therefrom to said L. L. Kellogg came on to be heard at March rules, 1904, before the said court.

The defendant L. L. Kellogg filed a demurrer to the bill, and also filed and offered at said hearing his affidavit in the nature of an answer to the averments of the bill. Said demurrer and affidavit shall be copied into the transcript.

Complainants also filed and offered at said hearing a large amount of documentary evidence and depositions to support the averments of the bill, which shall be omitted from the transcript.

After arguments heard, the court on June 2, 1904, made an order overruling the demurrer of said L. L. Kellogg to the bill, restraining the transfer of said 400 shares of Norfolk & Western Railway Company stock pendente lite, and the paying out of dividends

thereon pendente lite, and directing that the said affidavit of said Kellogg be treated as an answer to the bill, and that complainants file exceptions or replication thereto by July rules, 1904.

This order will be copied into the transcript for this appeal.

At the July rules, 1904, replication was filed to the said answer by the complainant, which replication will be copied into the transcript of this appeal.

(5) It is further stipulated that thereafter a large amount of evidence was taken by complainant to sustain all the allegations of the bill, and the defendant L. L. Kellogg took evidence on
73 his part. And the case was ready for hearing on its merits at the time April 17, 1908, when the said Mary C. Leary, administratrix, presented her said petition to the said court for leave to intervene.

The said Kellogg whose deposition had been taken in his own behalf, did not take or offer any evidence to establish the contract of indemnity under which he claimed in his said affidavit (or answer) to be holding said 400 shares of Norfolk & Western Railway Company stock, nor did he take or offer any evidence to show that he or his firm had any claim on said stock for fees.

By the evidence offered at said hearing for injunction pendente lite, the complainants established sufficiently for the purposes of that hearing the fact that: The 400 shares of the common stock of the Norfolk and Western Railway Company in controversy and which are described in Exhibit F to the bill, were purchased on March 26, 1900, by L. L. Kellogg in his own name but for account of Benjamin D. Greene, with part of the proceeds of 400 shares of stock of the Delaware, Lackawanna and Western Railway Company, 600 shares of the stock of the Canada Southern Railway Company and 100 shares of the stock of the Canada Southern Railway Company, sold by said L. L. Kellogg on March 23rd and March 26, 1900, as described in Exhibit F. That the said 400 shares of stock of the Delaware, Lackawanna and Western Railway Company and the said 700 shares of stock of the Canada Southern Railway Company had been purchased prior to December, 1899 by said Benjamin D. Greene, with moneys and proceeds thereof received by him as his share of the profits of the river and harbor contracts described in Exhibit E.

That the evidence taken on part of complainant for the trial of the merits of the cause, which established the same facts as above as against the then parties to the cause, was not controverted by any other evidence taken and said evidence was of file in the record of said cause prior to the presentation to the court of the petition of Mary C. Leary, administratrix, for leave to intervene.

The foregoing statement is to be taken as true for the purposes of this appeal, but it is not considered by either party that a consideration of the evidence for the trial of the case on the merits is necessary for this appeal and the same shall not be copied into the transcript for this appeal.

(6) It is further stipulated that there shall be copied into the transcript for this appeal:

74 (a) The petition of Mary C. Leary, administratrix, for leave to file her intervention, in which is embodied the proposed intervention.

(b) The order of April 17, 1908, made by the court requiring the parties to the suit to show cause against the granting of leave to file said petition and intervention.

(c) The response of the complainants to rule nisi and showing cause why the court should not allow said intervention of Mary C. Leary, administratrix, to be held.

(d) The order and decree of said court of July 20, 1908, that said petition of Mary C. Leary, administratrix, be overruled and that leave to file said bill of intervention be denied.

(e) The written opinion of Judge McDowell referred to in said order of July 20, 1908.

(f) This stipulation.

(g) Assignment of errors and prayer for reversal.

(h) Order allowing appeal.

(i) Bond for costs on appeal.

(j) Clerk's certificate to transcript.

But nothing herein shall be construed as any waiver on the part of the United States to insist that no appeal properly lies on the part of said Mary C. Leary, administratrix, from said order of July 20, 1908.

And in view of the fact that the subject matter of the said proposed intervention, is in the custody of the court, it is stipulated that if an appeal is allowed by said circuit court from said order of July 20, 1908, that no supersedeas order will be taken or supersedeas bond be given, and complainants will not move in said cause to take said stock or proceeds thereof out of the hands of the court, until the disposition of the questions raised by said appeal, without giving the said Mary C. Leary, administratrix, or her counsel 30 days' notice, without prejudice to the right of said appellant to then apply for supersedeas as if applied for at the time of taking her appeal.

MARION ERWIN,
Special Asst. to the Atty. Genl., Complts. Solicitor.
J. D. HORSLEY,
Counsel for Mary C. Leary, Adm'x.

JANUARY 18, 1909.

75 (Indorsed:) United States of America vs. Benj. D. Greene & als. Stipulation on appeal of Mary C. Leary, admx., intervention. Filed Jany. 19, 1909. S. W. Martin, clerk.

In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk and Western Railway Company, defendants.	In equity.

Upon the petition for leave to intervene and bill of intervention of Mary C. Leary, administratrix of James D. Leary, deceased.

ASSIGNMENT OF ERRORS.

Now comes the above appellant, Mary C. Leary, administratrix of James D. Leary, deceased, and files herewith her petition for an appeal, and says that there are errors in the records and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the United States Circuit Court of Appeals for the Fourth Circuit, makes the following assignment of errors, to wit:

First. The United States Circuit Court for the Western District of Virginia erred in decreeing that appellant's said petition for leave to intervene be overruled and that leave to file said bill of intervention be denied.

Second. The said United States Circuit Court for the Western District of Virginia erred in that it should have sustained appellant's said petition for leave to intervene and should have ordered and decreed that leave to file said bill of intervention be granted.

Third. The said United States Circuit Court for the Western District of Virginia erred in holding in its opinion that the said
76 bill of intervention was fatally defective in that it did not allege that "Leary at the time of the alleged agreement of indemnity was innocent of knowledge of the facts which are alleged in the original bill and which impress upon the stock a trust in favor of the Government."

Fourth. The said Circuit Court of the United States for the Western District of Virginia erred in holding in its said opinion filed with its said decree of July 20, 1908, in said cause, now and here complained of, that appellant petitioner's said bill of intervention was ambiguous in that said circuit court held that said bill of intervention did not "unequivocally allege an express agreement between Greene and Leary that the securities deposited with Kellogg were to be used to indemnify Leary."

Fifth. The said United States Circuit Court for the Western District of Virginia erred in holding as is set out in its said opinion that "there is no implied obligation on the part of a principal in a bail bond in a criminal case to indemnify his surety."

Sixth. The said Circuit Court of the United States for the Western District of Virginia erred in holding that an express contract by the

POOR

principal in a bail bond in a criminal case to indemnify his surety is void as against public policy.

Seventh. The said United States Circuit Court for the Western District of Virginia erred in holding that the United States of America, the plaintiff in the original suit, could rely upon the alleged illegality of the agreement between Greene and Leary to defeat an arrangement between Greene and Leary that had already been consummated by the delivery of the said Norfolk & Western Railway stock to the defendant Kellogg for the benefit of Leary.

Eighth. The said United States Circuit Court for the Western District of Virginia erred in holding that appellant is asking the aid of the court to enforce an illegal contract. Appellant is asking the court to hold that the said contract of indemnity between Greene and Leary having been executed by the delivery of the said Norfolk and Western Railway stock to Kellogg, the United States, which was not a party to said contract, cannot force a rescission thereof when all the parties thereto are willing to abide said contract, as is disclosed by the record in this suit to be the present case.

77 Ninth. The original bill of complaint is not good as against appellant because she was not a party thereto and no decree entered in the original suit when she was not a party therein could bind her in any way.

Tenth. The said United States Circuit Court for the Western District of Virginia should have allowed the filing of the said bill of intervention and should have granted the relief prayed for therein.

Wherefore, the said Mary C. Leary, administratrix of James D. Leary, deceased, appellant, prays that for the errors aforesaid and other errors appeaing in the record of said United States Circuit Court for the Western District of Virginia in the above entitled cause to the prejudice of the said appellant petitioner, the said judgment and decree of the said United States Circuit Court for the Western District of Virginia, to-wit, the decree entered therein July 20, 1908, in said cause be reversed, annulled, and for naught esteemed, and that said cause be remanded to the said United States Circuit Court for the Western District of Virginia with instructions for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

J. D. HORSLEY,
Attorney for Mary C. Leary, Administratrix of James D. Leary, Appellant.

(Indorsed:) U. S. Circ't Cr't, W. D. Va. United States vs. B. D. Greene & als. Assignment of errors by Mary C. Leary, admx. Filed Jany. 7, 1909. S. W. Martin, clerk.

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COPY

78 In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
BENJAMIN D. GREENE, LUTHER LAFLIN KELLOGG, and the Norfolk and Western Railway Company, defendants. } In equity.

Upon the petition for leave to intervene and bill of intervention of Mary C. Leary, administratrix of James D. Leary, deceased.

PETITION FOR APPEAL.

Considering herself aggrieved by the decree of the Circuit Court of the United States for the Western District of Virginia overruling the petition for leave to file her bill of intervention in the above entitled cause, and denying leave to file her said bill of intervention therein, your petitioner, Mary C. Leary, administratrix of James D. Leary, deceased, hereby prays an appeal from the said decree to the United States Circuit Court of Appeals for the Fourth Circuit, and an order fixing the amount of a supersedeas bond, in order that the errors complained of in the assignment of errors herewith filed by your petitioner on appeal may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

MARY C. LEARY,
Admx. of James D. Leary, Deceased, Appellant,
By J. D. HORSLEY, *Her Attorney.*

The foregoing petition is granted and appeal allowed as prayed for upon appellant's giving bond for costs according to law in the sum of $250.00. This Jany. 7, 1909.

HENRY C. McDOWELL.

(Indorsed:) U. S. Circt. Crt., W. D. Va. United States vs. B. D. Greene & als. Petition for appeal. Entered & filed Jany. 7, 1909. S. W. Martin, clerk.

79 In the Circuit Court of the United States for the Western District of Virginia.

THE UNITED STATES OF AMERICA
vs.
BENJAMIN D. GREENE AND OTHERS. } In equity.

Intervention of Mary C. Leary administratrix of James D. Leary, dec'd.

BOND.

Know all men by these presents that we, J. D. Horsley and Aubrey E. Strode, are held and firmly bound unto the United States of

America in the sum of two hundred and fifty dollars ($250.00), to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of January, 1909.

Whereas the above-named Mary C. Leary, as administratrix of James D. Leary, deceased, appellant, seeks to prosecute her appeal to the United States Circuit Court of Appeals for the Fourth Circuit, to reverse a decree rendered in the above-stated cause on the 20th day of July, 1908, by the said Circuit Court overruling her petition for leave to file a bill of intervention and denying leave to file said intervention.

Now, therefore, the condition of this obligation is such that if the above-named Mary C. Leary, administratrix, appellant, shall prosecute her said appeal to effect and answer all cost that may be adjudged if she shall fail to make good her plea, then this obligation to be void, otherwise to remain in full force and effect.

J. D. HORSLEY. [SEAL.]
AUBREY E. STRODE. [SEAL.]

VIRGINIA,

City of Lynchburg, to wit:

Personally appeared before me in my city the above-named J. D. Horsley and Aubrey E. Strode and severally made oath that each of them, above his own debts and the debts of others upon which he is bound and expects to have to pay, is worth at least the sum of two hundred and fifty dollars ($250.00).

80

Witness my hand this 19th day of January, 1909.

JOHN D. EASLEY, *N. P.*

JANUARY 19, 1909.

Approved.

HENRY C. MCDOWELL,
District Judge.

(Indorsed:) United States of America vs. Benj. D. Greene & als. Bond on appeal of Mary C. Leary, admx. Filed Jany. 19, 1909. S. W. Martin.

CITATION.

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at the clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit, in the city of Richmond, Virginia, on thirty days from this date pursuant to an order allowing an appeal filed in the clerk's office of the Circuit Court of the United States for the Western District of Virginia, at Lynchburg, wherein Mary C. Leary is intervener and you are defendant, to show cause, if any there be, why the decree rendered against the said Mary C. Leary as in said

appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry C. McDowell, United States district judge, this 7th day of January, 1909.

[SEAL OF COURT.] S. W. MARTIN,
Clerk United States Circuit Court.

A copy. Teste:

——— ———, *Clerk.*

81, 82 STATE OF VIRGINIA,
City of Roanoke, to wit:

This day personally appeared before me, Albert Hopwood, a notary public in and for the city and State aforesaid, W. C. Allen, deputy sergeant of the city of Roanoke, Virginia, and made oath that he executed the within notice on Thomas L. Moore, the United States district attorney for the Western District of Virginia, by handing him a copy thereof on January 7, 1909, in the city of Roanoke, Virginia, where the said Thomas L. Moore resides.

Given under my hand and seal of office this day of January, 1909.

[NOTARIAL SEAL.] ALBERT HOPWOOD,
Notary Public.

My commission expires August 7, 1911.

And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, mentioned in the stipulation as aforesaid, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

UNITED STATES OF AMERICA,
Western District of Virginia.

I, S. W. Martin, clerk of the Circuit Court of the United States for the Western District of Virginia, at Lynchburg, Virginia, do certify that the foregoing is a true transcript of the record and proceedings of the said Circuit Court in the case of the United States of America vs. Benjamin D. Greene et al., as mentioned in the stipulation prepared by counsel and made a part thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Circuit Court, this 1st day of February, 1909.

[SEAL OF COURT.] S. W. MARTIN,
Clerk U. S. Circuit Court, Western District of Virginia, at Lynchburg, Virginia.

83, 84 And on the same day, to wit, February 4, 1909, the appearance of J. T. Coleman, Aubrey E. Strode, and J. D. Horsley is entered for the appellant, and the appearance of Marion Erwin, special assistant to Attorney General, is entered for the appellee.

Afterwards, on another day to wit, February 23, 1909, twenty copies of the printed record are filed.

At the May term, 1909, of our said Circuit Court of Appeals, to wit, on the 11th day of May, 1909, the said cause came on to be heard and is argued by counsel before Pritchard, circuit judge, and Waddill and Keller, district judges, and submitted.

Order restoring case to docket for rehearing.—Filed and entered July 15, 1910.

United States Circuit Court of Appeals, Fourth Circuit.

No. 889.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, DECEASED, appellant,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

85, 86 Appeal from the Circuit Court of the United States for the Western District of Virginia, at Lynchburg.

For reasons appearing to the court, it is ordered that this case be restored to the docket to be heard in due course.

J. C. PRITCHARD,
Circuit Judge, Presiding.

JULY 15TH, 1910.

Afterwards, at the November term, 1910, of our said Circuit Court of Appeals, to wit, on the 10th day of November, 1910, the said cause came on to be reheard and is reargued by counsel before Goff and Pritchard, circuit judges, and Rose, district judge, and submitted.

Afterwards, at the same term, to wit, on the 7th day of December, 1910, the court here announced and filed its opinion, which is as follows, to wit:

87 *Opinion.—Filed Dec. 7, 1910.*

United States Circuit Court of Appeals, Fourth Circuit.

No. 889.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, DECEASED, appellant,

versus

THE UNITED STATES, APPELLEE.

In error to the Circuit Court of the United States for the Western District of Virginia.

(Argued November 10, 1910. Decided December 7, 1910.)

Before Goff and Pritchard, circuit judges, and Rose, district judge.

J. T. Coleman and A. E. Strode (David McClure on brief) for appellant, and Marion Erwin, special assistant to the Attorney General (Thos. L. Moore, U. S. attorney, on brief), for appellee.

ROSE, district judge:

The appellant filed in the court below a petition for leave to intervene and a bill of intervention in the cause of the United States vs. Benjamin D. Greene, Luther Lofflin Kellogg, and the Norfolk & Western Railway Company.

The original bill of the United States was filed December 13, 1903.

It set forth with much detail the Government's version of the
88 conduct of Oberlin M. Carter, John L. Gaynor, and the defendant Greene in connection with public contracts for the improvement of Savannah Harbor and neighboring waters. Much litigation has made this story a familiar tale. It suffices here to say that the bill alleges that upwards of $2,000,000 was fraudulently obtained from the United States by Carter, Gaynor, and Greene. Subject to certain minor adjustments, this sum was equally divided among them, so that Greene's share was in the neighborhood of $700,000. The bill further charged that in order to prevent the United States from recovering this money Greene put it in the name of other people to be held for his benefit. Among those who undertook to hold property for Greene was the defendant Kellogg. The bill alleges that $113,926.55 of the money so fraudulently obtained by Greene was placed by him in Kellogg's hands. A part of such money ultimately was invested in 400 shares of the stock of the Norfolk & Western Railway Company which at the time the bill was filed was represented by certificates 5896, 5897, 5898, 11077, and 74200. The bill alleged that such stock was still held by Kellogg for the use and benefit of Greene. It says that Kellogg had been counsel for Greene, Gaynor, and Carter during much of the protracted litigation, civil, criminal, and military, which had grown out of the Savannah frauds. Among other things the bill prayed that such stock should be declared to be the property of the United States, and that pending the final hearing of the case made by the bill the defendant should be enjoined from disposing or transferring such stock.

The Norfolk & Western Railway Company answered that all it knew about the matter was that the stock appeared on its books in the name of Kellogg. It disclaimed all interest in the controversy and submitted to whatever decree the court might pass. Greene, though personally summoned, never appeared or answered, and as against him the bill was taken pro confesso. Kellogg demurred to the bill and filed with his demurrer a supporting affidavit. The court overruled the demurrer and treated the affidavit as an answer. In view of the subsequent course of the case only a small portion of his answer had any relevancy to the questions raised on this appeal. It stated that when in December, 1899, Greene was first arrested in connection with these alleged frauds Kellogg induced one Leary, a client and friend of his, to become bail in the sum of $25,000 for Greene's appearance before the United States Commissioner in New York. Kellogg personally, so he said, gave Leary a written

guarantee to protect the latter from loss or damage in conse-
89 quence of becoming such bail. Kellogg's answer further says that at about the same time Greene deposited with Kellogg some securities for the purpose of indemnifying Kellogg on this guarantee, with the understanding that Greene might at any time withdraw the deposited securities or dispose of them and substitute others in their place. Such securities, it alleged, were to be held by Kellogg to secure him and his firm for fees and disbursements in connection with the litigation then pending. Kellogg's answer states that the original securities were disposed of, and that the Norfolk & Western Railway Company stock in controversy was substituted for some of them. He says he held that stock as security to protect him for loss under his guarantee to Leary before mentioned, or because of Leary having become surety in the sum of $40,000 for Greene's appearance in Georgia, Kellogg's agreement to indemnify Leary having been extended, the answer alleges, to said last-mentioned bond, and that he also held the stock to secure to himself and his firm the payment of their fees and disbursements.

The record shows that on June 2nd, 1904, the court below granted an order pendente lite restraining the transfer of the stock and the payment of dividends thereon. The case was put at issue by the general replication of the Government filed in July, 1904.

Testimony was taken on both sides and at the time of the filing of the petition for intervention the case was ready for final hearing. It is stipulated in the record that the United States had taken a large amount of evidence to sustain all its allegations and that, although Kellogg testified in his own behalf, he did not take or offer any evidence to establish the contract of indemnity spoken of by him in his answer, nor did he take or offer any evidence that either he or his firm had any claim upon such stock for fees. It was further stipulated that in support of the motion for an injunction pendente lite the United States had offered evidence sufficient to establish that the 400 shares of Norfolk & Western Railway Company stock in controversy had been purchased March 26, 1900, by Kellogg in his own name but for the account of Greene with part of the funds derived from the sale of certain stocks of the Delaware, Lackawa'na and Western Railway Company and of the Canada & Southern Railway Company sold by Kellogg March 23 and 26, 1900, and that the stocks so sold had been purchased by Greene in the name of Kellogg prior to December, 1899, the date of his first arrest, and that the money with which they had been purchased was a part of Greene's share of the funds coming from the
90 Savannah contracts. It was further stipulated that as evidence to be used at the final hearing the Government had offered testimony to prove the same facts and that no evidence to contradict it had been offered, and that all the testimony was on file in the record of the cause prior to the presentation to the court on April 18, 1908, of the intervenor's petition.

The petition for leave to intervene and the bill of intervention offered therewith alleged that the intervenor was the administratrix of James D. Leary; that on December 11, 1899, Greene had been arrested in the Southern District of New York on a United States commissioner's warrant based upon an indictment found in the United States District Court for the Southern District of Georgia and was held in $25,000 bail; that either Greene or Kellogg applied to Leary to furnish this bail; that Leary became bail; that the same time Greene placed in Kellogg's hands, as trustee and depositary to secure Leary against loss by reason of his having become bail, 300 shares of Delaware, Lackawa'na & Western Railway Company stock upon the "condition and understanding that Kellogg should hold such shares of stock in trust for Leary until Leary was released from the bail bond or in case Leary's liability thereon should be established that said shares of stock should be applied in payment of the obligation assumed by Leary;" that Greene withdrew the Delaware, Lackawa'na & Western Railway Company stock and substituted the 400 shares of Norfolk & Western Railway Company stock upon the same terms and conditions; that on May 28, 1901, a warrant was issued for Greene's removal to Georgia; that he was admitted to bail in the sum of $40,000 for his appearance in Georgia for trial; that Kellogg applied to Leary to give such bail; that Leary did so on January 20, 1902, upon the condition and understanding that the securities held in trust and deposited by Kellogg should remain and continue in the hands of Kellogg as security and indemnity to Leary; that Greene did not appear for trial in the United States District Court for the Southern District of Georgia according to the terms of the recognizance and therefore, on March 7, 1902, the recognizance was forfeited and the said District Court adjudged that the United States should recover from Greene and Leary $40,000, unless by the next term of the court they should show cause why such order should not be made final; that on January 12, 1903, the said judgment was made final and execution thereon awarded; that on September 10, 1903, the United States brought suit against the intervenor in the United States
District Court for the Southern District of New York to
91 recover the amount of such recognizance, and that in said
suit on January 6, 1908, judgment against intervenor was entered for $35,377,46, which judgment has not been paid, set aside, or reversed. The petition alleged that Kellogg holds the stock and its dividends as trustee and depositary and for the benefit and protection of the intervenor, and that the intervenor's claim upon, and right to, the stock is not liable to the claim of the United States "except to the extent of any surplus remaining after making full indemnity to the intervenor."

The court below ordered that notice of the filing of the petition be given to the other parties to the cause. The United States objected to the granting of the leave prayed for. In so doing it said that the decree pro confesso established as against Greene the Government's

title to the stock and that the Government's title was good as against any person claiming under Greene and not a purchaser for value without notice, which in said petition the intervenor did not allege herself to be. It further asserted that the petition did not allege that the contract under which the intervenor claims was in writing, and therefore under the statute of frauds it was not enforceable; that whether in writing or not, such contract was against public policy; that the intervenor was barred by laches in not presenting the petition at an earlier stage of the proceeding and that in form and substance the intervention was without equity. The intervenor did not offer to amend. The Government's objections to granting leave to the petitioner to intervene were set down for hearing. The learned judge below was of the opinion that the bill was fatally defective in that it nowhere alleged that the petitioner's intestate at the time of giving bail was ignorant of the facts alleged in the original bill which imposed upon the securities in question a trust in favor of the Government, and because it was not possible from the allegations of the petition to make out whether the contract of indemnity was express or implied. He pointed out that it is settled that the law does not imply an obligation upon the part of one charged with a criminal offense to indemnify his bail for any loss which the latter may suffer by reason of the former's failure to appear in accordance with the terms of his recognizance. (United States vs. Ryder, 110 U. S., 729.) The learned judge was of the opinion that even an express contract made by a criminal to indemnify his bail is against public policy and is unenforceable. Leave to file the bill of intervention was therefore denied.

The intervenor says that an express contract by one accused of crime to indemnify his bail is not against public policy. The Government says it is.

92 A person held to bail in a civil case may indemnify his bail. (United States vs. Ryder, 110 U. S., 729; Cripps vs. Hartnoll, 4 B. & S., 414; Green vs. Cresswell, 10 A. & E., 453; Perley vs. Spring, 12 Mass., 297.)

A contract by one not accused of crime to indemnify the bail of one who is, is enforceable. (Cripps vs. Hartnoll, 4 B. & S., 414; Holmes vs. Knight, 10 N. H., 175; Anderson vs. Spring, 72 Ind., 315; Keesling vs. Frazier, 119 Ind., 185.)

When the State by statute has provided for the acceptance of cash bail, contracts to indemnify bail are not against public policy. (Maloney vs. Nelson, 144 N. Y., 189; Maloney vs. Nelson, 158 N. Y., 352.)

When the bail at the time of receiving the indemnity knows that it is the intention of the accused not to present himself for trial no recovery can be had on the contract to indemnify. (Ratcliffe vs. Smith, 13 Bush. (Ky.), 172.)

The Supreme Court has decided that the law does not imply a contract that one held to bail in a criminal case will indemnify his surety. (United States vs. Ryder, 110 U. S., 737.)

In the case at bar the intervenor relies upon an express contract of the accused to indemnify his bail.

In England such contracts are unenforceable. (Wilson vs. Strugnell, L. R., 7 Q. B. Div., 548; Herman vs. Jeuchner, L. R., 15 Q. B. Div., 561.)

The English rule has been approved in Littleton vs. State, 46 Arkansas, 413; United States vs. Simmons, 47 Federal, 577.

93 On the other hand, the highest courts of South Carolina, Georgia, and West Virginia have held such contracts valid. (Reynolds vs. Harral, 2 Strob., 87; Simpson vs. Roberts, 35 Georgia, 180; Carr vs. Davis, 64 W. Va., 522.)

The text writers are as divided as the courts. Highmore on Bail, 204; 3 Am. & Eng. Ency., 684, and 16 Am. & Eng. Ency., 172, hold such agreements to be against public policy.

Pingree on Suretyship, sec. 416, thinks they are not.

Brandt on Suretyship, sec. 610, is frankly in doubt.

The question is important. There is much difference of opinion about it. We should not pass upon it unless it is necessary to the decision of the case before us. In our view there is no such necessity.

Whether a contract by one accused of crime to indemnify his bail is or is not against public policy, the action of the court below in refusing the intervention was right and should be affirmed. "An intervention that savors of laches and is of doubtful equity will not be permitted." (2 Streets Federal Equity Practice, sec. 1373.)

Where a petition for intervention was filed three years after it might have been, Judge Taft held that it was affected by laches. (Continental Trust Company vs. Toledo, St. Louis and K. C. R. Co., 82 Fed., 642.)

In the case before us the petition for intervention was not filed until more than four years and three months after the institution of the suit. The facts disclosed by the record make it hard to believe that the appellant did not know of its pendency for years before she sought to intervene. She does not say that she was ignorant of its pendency. If she could have truthfully said so, it must be presumed she would. She gives no reason why she waited so long before seeking to come in. This she is bound to do. She incidentally states that judgment was not recovered against her by the United States on the forfeited recognizance in the United States Circuit

94 Court for the Southern District of New York until January 8th, 1908. The petition for leave to intervene was filed April 18th, 1908, three months and ten days thereafter. She does not assign the date of the New York judgment as the reason why she did not seek to intervene at an earlier date. Legally it could not have been, and that for two reasons. The forfeiture of the recognizance for the appearance of Greene was made final and execution awarded thereon by the United States District Court for the Southern District of Georgia in January, 1903, more than five years before the filing of the petition in intervention in this case. Had the appellant had

property in that district it could and doubtless would have then been levied upon. She certainly then knew of what had happened and of the liability under which she had come. In the second place, the whole theory of her claim in this case is that she and her intestate have held a right in the securities at all times since the execution of the recognizance in 1902. Such rights were assailed so soon as the Government filed the original bill in this cause. It sought in disregard of them to have itself declared the beneficial owner of the shares of stock in controversy. If her present contention is sound, she was legally entitled to intervene so soon as she learned of the pendency of this cause. Suit was brought against her in the United States Circuit Court for the Southern District of New York more than four years before she asked to come into the here pending controversy. She waited until all the testimony in the latter cause had been taken and until after it was ready for final hearing, and then for the first time sought to assert the rights she claims. If she be permitted to intervene there will be further delay in determining the rights of the parties who have been so many years before the court. She does not say why she did not come in, when she had a right to come in as she now asserts, and when her coming in would have saved so much time and money. Her unexplained delay, under all the circumstances of this case, requires the denial of her petition. This is especially true when it is borne in mind that she does not in her bill of intervention question that the United States was in truth and in fact the equitable owner of the securities at the time she says her intestate bargained with Greene and Kellogg for an interest in them, and that she does not allege that her intestate was without knowledge or notice of the rights of the United States to them. She has no possible case on any theory unless her intestate was a purchaser for value and without notice. When, more than four years after the suit was begun, she seeks to be let into it, she does not say that her intestate was without notice.

95, 96 For all that is said in the petition to intervene and in the proposed bill of intervention submitted with it, the appellant's intestate when he went bail and bargained for indem'ity may have known that Greene intended to fly to Canada and that the securities in Kellogg's hands represented money fraudulently obtained from the United States, the appellant herself may have known of the pendency of the present suit years before she sought to intervene and may be now intervening because the defense set up by Kellogg therein has apparently broken down.

It is of course possible that no one of these things is true, but it was the duty of the appellant when at this late day she asked permission to come into the case to allege distinctly that they were not.

The petition for leave to intervene was properly refused.

Affirmed.

97,98 Afterwards, at the same term, to wit, on the 8th day of December, 1910, the court here made and entered the following decree, to wit:

Decree.—Filed and entered December 8, 1910.

United States Circuit Court of Appeals, Fourth Circuit.

No. 889.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, DECEASED, appellant,

vs.

THE UNITED STATES OF AMERICA, APPELLEE.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed.

NATHAN GOFF.

December 8th, 1910.

99,100 Afterwards, to wit, on December 29, 1910, the mandate of this court is issued and transmitted to the Circuit Court of the United States for the Western District of Virginia, at Lynchburg, in due form.

Afterwards, on the 28th day of January, 1911, Mary C. Leary, administratrix of James D. Leary, deceased, appellant, by her attorneys, filed her petition for an appeal, together with an assignments of error, which are as follows, to wit:

Petition of appellant for an appeal.—Filed January 28, 1911.

The United States Circuit Court of Appeals for the Fourth Circuit.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, DECEASED, appellant,

versus

THE UNITED STATES OF AMERICA, APPELLEE.

The above-mentioned appellant, Mary C. Leary, administratrix of James D. Leary, deceased, respectfully shows that the above-entitled

cause is now pending in the United States Circuit Court of Appeals for the Fourth Circuit, and that a judgment has therein been rendered on the 8th day of December, 1910, A. D., affirming
101,102 the decree of the Circuit Court of the United States for the Western District of Virginia, and that the matter in controversy in said suit exceeds $1,000.00 besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Fourth Circuit does not have final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore the said appellant prays that an appeal be allowed her in the above entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Fourth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

DAVID MCCLURE,
J. T. COLEMAN,
AUBREY E. STRODE,
Attorneys for Appellant.

103,104 *Assignments of error.—Filed January 28, 1911.*

The United States Circuit Court of Appeals for the Fourth Circuit.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, DECEASED, appellant,
versus
THE UNITED STATES OF AMERICA, APPELLEE.

The appellant in the above entitled cause, in connection with her petition for appeal herein, presents and files therewith this, her assignment of errors, as to which matters and things she says that the decree entered herein on the 8th day of December, 1910, is erroneous, to wit:

First. The said Circuit Court of Appeals erred in not passing upon and sustaining the validity of the contract of indemnity upon a bail bond set out in appellant's bill.

Second. The said Circuit Court of Appeals erred in holding that appellant was in laches in filing her petition for intervention.

Third. The said Circuit Court of Appeals erred in holding that it must be presumed that appellant knew of the pendency of
105,106 the main cause for years before she sought to intervene.

Fourth. The said Circuit Court of Appeals erred in holding that appellant was bound to state in her intervention bill reasons not therein appearing for her failure to offer her intervention bill at an earlier date.

Fifth. The said Circuit Court of Appeals erred in holding that the unexplained delay of appellant under all the circumstances of this case requires the denial of her petition.

Sixth. The said Circuit Court of Appeals erred in holding that appellant in her intervention bill should have denied notice on the part of her intestate of the alleged rights of the appellee in the securities involved at the time that he bargained for them.

Seventh. The said Circuit Court of Appeals erred in holding that appellant's intervention bill should have stated that appellant's intestate did not know that Greene intended to fly to Canada and did not know that the securities in Kellogg's hands represented money fraudulently obtained from the United States and that the appellant, herself, did not know of the pendency of the present suit years before she sought to intervene and that she was not
107, 108 intervening because the defense set up by Kellogg therein had apparently broken down.

Eighth. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court for the Western District of Virginia and in not allowing an opportunity to appellant to offer such amendments to her intervention bill as would have met the objections found thereto by the said Circuit Court of Appeals.

Ninth. The said Circuit Court of Appeals erred in not reversing the judgment of the Circuit Court for the Western District of Virginia and in not remanding the cause to said Circuit Court with direction for the allowance of such amendments as appellant might be advised to make and the facts justified, in order to meet, if she could, the decision of the said Circuit Court of Appeals.

Tenth. Even if the bill of intervention be in fact obnoxious to the objections thereto, as found by the Circuit Court of Appeals, and be defective in all the respects pointed out in the opinion of that court, the Circuit Court of Appeals nevertheless erred in not remanding the cause to the Circuit Court with directions that opportu-
109, 110 nity be given appellant for such amendments as she might be advised to make and the facts justified, in order to cure, if she could, the defects in her bill of intervention as found by the Circuit Court of Appeals. (In this connection attention is called to the fact that while the Circuit Court held the bill of intervention defective in certain particulars, it nevertheless forestalled, and, in effect, denied application for leave to amend, upon the ground that the contract set up in the bill of intervention was a void contract, however pleaded, and that any amendment of the bill of intervention would, therefore, be idle and vain.)

Eleventh. The Circuit Court of Appeals erred in dismissing the bill of intervention because of merely technical and curable defects therein without allowing any opportunity to amend—errors which the Circuit Court held to be curable by amendment, but nevertheless declined to allow the intervenor to cure, because the contract set up in the bill of intervention was a void contract, however pleaded—the action of the Circuit Court of Appeals being, in effect, to affirm the

decree of dismissal by reversing the Circuit Court in its ruling in respect to the technical or curable defects in the bill of
111,112 intervention.

Twelfth. The said Circuit Court of Appeals erred in not reversing the said Circuit Court and in not holding that a contract of indemnity upon a criminal bail bond is valid and not repugnant to public policy.

Wherefore the said Mary C. Leary, administratrix of James D. Leary, deceased, appellant, prays that for the errors aforesaid and for other errors appearing in the record of said United States Circuit Court of Appeals for the Fourth Circuit, in the above entitled cause to the prejudice of the said appellant, the said judgment and decree of the said United States Circuit Court of Appeals for the Fourth Circuit, entered therein December 8th, 1910, in said cause be reversed, and that the appellant may have an adjudication and decree in her favor as herein specified and that said cause be remanded to the United States Circuit Court for the Western District of Virginia with instructions for such further proceedings in said cause as may be determined to the end that justice may be done in the premises.

DAVID MCCLURE,
J. T. COLEMAN,
AUBREY E. STRODE,
Attorneys for Mary C. Leary,
Administratrix of James D. Leary, deceased, Appellant.

113,114 *Order allowing an appeal to the Supreme Court of the United States and staying proceedings in the Circuit Court of the United States for the Western District of Virginia.—Filed January 28, 1911.*

The United States Circuit Court of Appeals for the Fourth Circuit.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, DECEASED, appellant,
versus
THE UNITED STATES OF AMERICA, APPELLEE.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed, and it further appearing to the court that the mandate in this case has gone down it is hereby further ordered that the proceedings in the Circuit Court of the United States for the Western District of Virginia be stayed until further ordered in this case.

J. C. PRITCHARD,
U. S. Circuit Judge.

January 28th, 1911.

115,116 *Appeal bond.—Filed January 28, 1911.*

The United States Circuit Court of Appeals for the Fourth Circuit.

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, DECEASED, appellant,
versus
THE UNITED STATES OF AMERICA, APPELLEE.

Know all men by these presents that we, J. T. Coleman, of the city of Lynchburg, State of Virginia, and Aubrey E. Strode, of the county of Amherst, State of Virginia, are held and firmly bound unto the United States of America in the sum of one thousand dollars ($1,000.00), to be paid to the said United States of America; we bind ourselves and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with out seals and dated the 26th day of January, 1911.

Whereas, the appellant in the above-entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Fourth Circuit on the 8th day of
117,118 December, 1910:

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect, and answer all damages and costs if she fail to make said appeal good, then this obligation shall be void, otherwise to remain in full force and virtue.

J. T. COLEMAN. [SEAL.]
AUBREY E. STRODE. [SEAL.]

The foregoing bond is approved. This Jan. 28th, 1911.
J. C. PRITCHARD.

STATE OF VIRGINIA,
City of Lynchburg, to wit:

J. T. Coleman, one of the sureties named in the foregoing bond, being first duly sworn, says:

That he is a resident and freeholder in the city of Lynchburg, county of Campbell, State of Virginia, and is worth the sum of one thousand dollars ($1,000.00) over and above all his just debts and liabilities, exclusive of property exempt from execution.

J. T. COLEMAN.

119 Subscribed and sworn to before me this 27 day of January, 1911, in my city and State aforesaid.

[NOTARIAL SEAL.] JOHN D. EASLEY,
Notary Public in and for the City of Lynchburg and State of Virginia.

STATE OF VIRGINIA,
City of Lynchburg, to wit:

Aubrey E. Strode, one of the sureties named in the foregoing bond, being first duly sworn says:

That he is a resident and freeholder in the county of Amherst, State of Virginia, and is worth the sum of one thousand dollars ($1,000.00) over and above all his just debts and liabilities, exclusive of property exempt from execution.

AUBREY E. STRODE,

Subscribed and sworn to before me this 27th day of January, 1911, in my city and State aforesaid.

[NOTARIAL SEAL.]

JOHN D. EASLEY,
Notary Public in and for the City of Lynchburg and State of Virginia.

The foregoing bond is approved this 28th day of Jan., 1911.

J. C. PRITCHARD,
United States Circuit Judge.

120

Citation.

The United States Circuit Court of Appeals, for the Fourth Circuit.

To the United States of America, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit, wherein Mary C. Leary, administratrix of James D. Leary, deceased, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Jeter C. Pritchard, judge of the United States Circuit Court of Appeals for the Fourth Circuit, this 28th day of Jan., 1911.

J. C. PRITCHARD,
Judge United States Circuit Court of Appeals, Fourth Circuit.

Service of the above citation acknowledged this February 3rd, 1911.

MARION ERWIN,
Special Asst. to the Atty. Genl., Sol. of Record for United States.

121 *Order to transmit record.*

And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Teste: HENRY T. MELONEY, *Clerk.*

Clerk's certificate.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 7th day of February, A. D. 1911.

[SEAL.] HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

(Indorsement on cover:) File No., 22527. U. S. Circuit Court Appeals, 4th Circuit. Term No., 508. Mary C. Leary, administratrix of James D. Leary, deceased, appellant, vs. The United States. Filed February 15th, 1911. File No., 22527.

○

FILED
NOV 24 1911
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

No. 508

MARY C. LEARY, Administratrix of JAMES B. LEARY, Deceased,

Appellant,

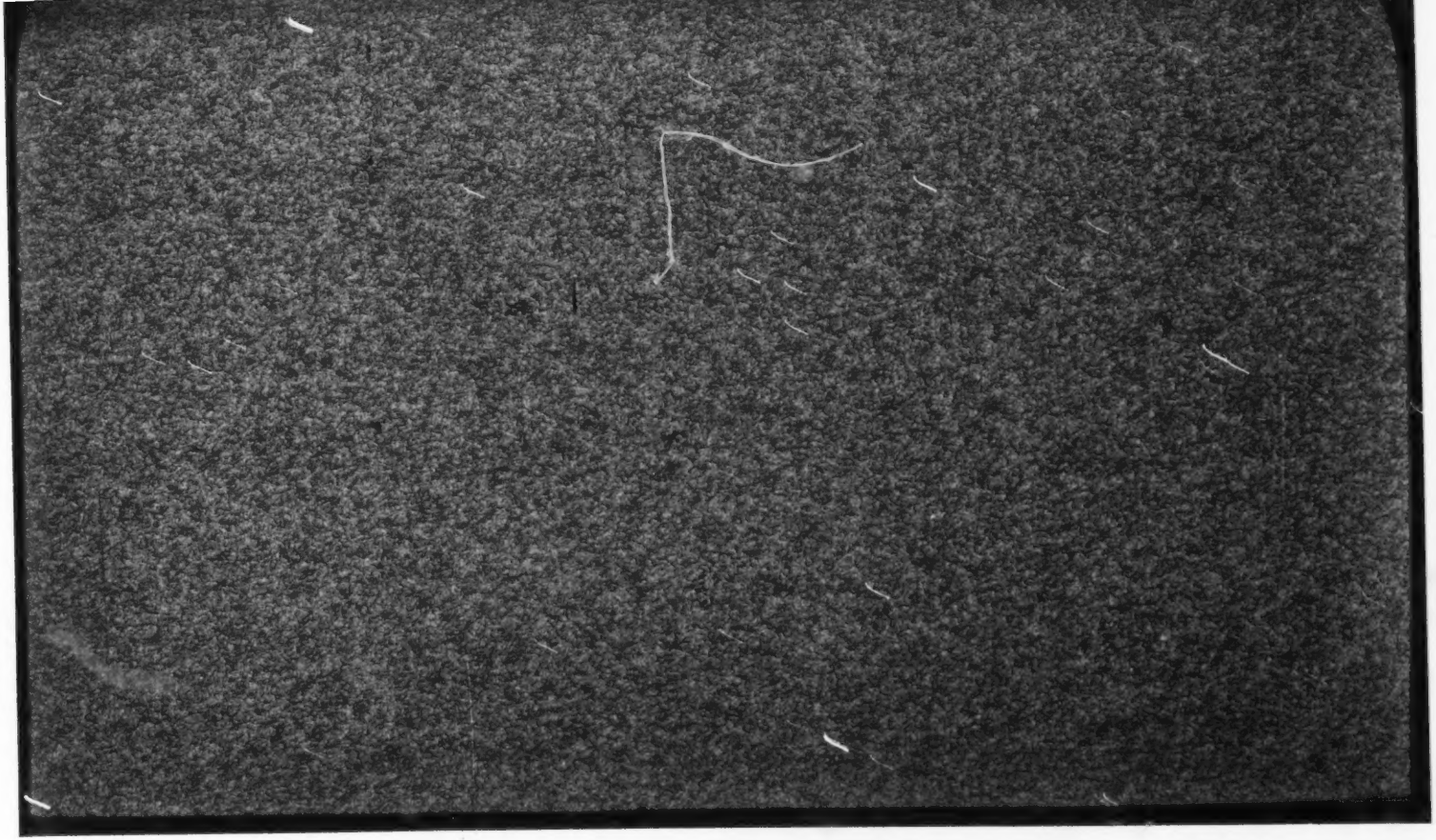
vs.

THE UNITED STATES,

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

MOTION TO AFFIRM.

E. W. LEHMANN,
Solicitor General,
MARION BUTLER,
Special Asst. to the Atty. Gen'l.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 508

MARY C. LEARY, Administratrix of JAMES D. LEARY, Deceased,

Appellant,

vs.

THE UNITED STATES.

MOTION TO AFFIRM.

The Solicitor General on behalf of the United States moves the court to affirm the judgment and decree of the Circuit Court of Appeals of the Fourth Circuit in the above stated cause, on the ground:

(1) That it is manifest that the appeal was taken for delay only, and (2) because the questions on which the decision of the cause depend are so frivolous as not to need further argument.

Respectfully submitted,

F. W. LEHMANN,
Solicitor General.

MARION ERWIN,
Special Asst. to the Atty. Genl.

STATEMENT.

The transcript of the record on this appeal has been printed, and references are herein made thereto.

The case made by Mary C. Leary, Administratrix, was on a petition filed by her, in the Circuit Court of the United States for the Western District of Virginia, praying leave to intervene in the equity cause of the United States *vs.* Benjamin D. Greene *et al.*, to which petition is attached a copy of her proposed intervention. The proposed intervention undertook to set up in her a claim or equitable right to certain Norfolk & Western Railway Company stock, which was held under the process of that court, to await its final decree in the said equity cause of the United States *vs.* Benjamin D. Greene *et al.*

The said Circuit Court denied the petition for leave to intervene, and the petitioner appealed to the Circuit Court of Appeals, which affirmed the judgment of the court below, and the petitioner then appealed to this court.

For a proper understanding of the case it is necessary to make a summary of the proceedings antecedent to the filing of the Leary petition.

The Original Bill.

The original bill (Rec., 1) in the above stated cause was filed December 19, 1903, by the United States against Benjamin D. Greene, Luther Laflin Kellogg, and the Norfolk & Western Railway Com-

pany to subject among other assets 400 shares of the stock of the Railway Company par value $40,000.00 standing in the name of Luther Laflin Kellogg on the stock books of the company, to the claims of the United States as being an investment made with diverted trust funds belonging to the United States. It is averred in the original bill that the defendant Benjamin D. Greene, conspiring with Oberlin M. Carter, John F. Gaynor, and others, defrauded the United States out of a large amount of money which had been entrusted to Oberlin M. Carter, a disbursing officer, for river and harbor improvements under his charge as engineer officer of the United States by methods and schemes which are set out with great particularity in the bill. The particular contracts under which the frauds were charged to have been committed are described, and in lieu of certain exhibits omitted from the record it is stipulated (Rec., 59) "That the allegations of the bill, in regard to the means by which the engineering work was conducted so as to accomplish the frauds charged shall be taken as sufficiently averred and charged in the bill."

Paragraph VI of the bill sets out with particularity the manner in which the money entrusted to Carter as such officer was fraudulently diverted and divided between Greene, Gaynor and Carter.

Besides the general averments, paragraph VII of the bill states:

> "Your orators file herewith as Exhibit E a table setting forth the fraudulent profits of the aforesaid contracts, which were divided by thirds between Benjamin D. Greene, John F. Gaynor and Oberlin M. Carter, and the aggregate amounts thereof retained by said Benjamin D. Greene out of the divisions so made to which the usual reference is prayed.

Your orators file herewith as Exhibit F a table setting forth certain of the proceeds of said fraudulent profits from the share of the same retained by said Benjamin D. Greene, aggregating $113,926.55 which have been traced into the possession of said Luther Laflin Kellogg, to which table the usual leave of reference is prayed."

Exhibit E is found in the record at page 27 and sets out in detail the dates when the divisions of the fraudulent profits were made, the contracts on which the money was fraudulently paid out by Carter, and the specific amounts retained therefrom by Greene.

Exhibit F is found at page 28 of the record, and sets out:

"Certain receipts and re-investments by L. Laflin Kellogg, of funds derived from the securities bought or redeemed by Benjamin D. Greene with diverted funds as per Exhibit E (Divisions 2 to 32 inclusive), or the proceeds of the re-investments thereof,"

and includes a statement of the re-investment of the diverted trust funds, made in Kellogg's name March 26, 1900, in the 400 shares of Norfolk & Western Ry. stock in controversy. It is further averred and charged in the original bill (Rec., 24):

"Your orators aver and charge that in order to prevent your orators from recovering from the said Benjamin D. Greene the large amount of investments into which he had diverted the said money of the United States so fraudulently obtained, the said Benjamin D. Greene set about concealing the same by making other people the holders thereof but secretly for his benefit and your orators aver and charge on information and belief that among the assets so concealed were and are the assets described on Exhibit F hereto, as received and handled by the said L. Laflin Kellogg for account of said Greene, and particularly the said 400 shares of the common stock of

the Norfolk & Western Railway Company, certificate numbers 5896, 5897, 5898, 11077, 74200, which shares still stand in the name of the said L. Laflin Kellogg on the books of said Railway Company.

And your orators aver and charge that all of said assets described in Exhibit F, were so received by the said L. Laflin Kellogg with full notice of the fraud set forth in this bill, and with full notice that by reason of said fraud the said assets were held by the said Benjamin D. Greene as a trust fund for the benefit of your orators."

Besides prayers for restraining orders, injunction, subpœnas, and general relief the bill contains the following prayer:

"3. That the court will in due course by its final decree declare all of the aforesaid investments within the jurisdiction of the court, into which the funds so intrusted to said Oberlin M. Carter as disbursing officer and so fraudulently diverted to the use of said Benjamin D. Greene as aforesaid, in the hands of the defendants and of all persons holding the same for the benefit of said Benjamin D. Greene or taking the same with notice of the fraud, are together with the income, properties held in trust for orators, and will decree a delivery of the same or proceeds thereof to your orators, or a conveyance of the same to your orators, or a sale of the same and delivery of the proceeds to your orators as the nature of the case and justice may require. And that your orators may have a personal judgment against the said L. Laflin Kellogg for the amount of all of said trust funds traced to him which he may fail to account for."

Proceedings Subsequent to Filing of Bill.

All the defendants were served (Rec., 59). Benjamin D. Greene made default and a decree *pro confesso* was duly entered against him at April rules 1904 (Rec., 59).

The Norfolk and Western Railway Company answered the bill and admitted that the 400 shares of stock for which the certificates in questions, were issued to Kellogg stand in the name of L. Laflin Kellogg on the books of the company, and submitted itself to such order or decree as to the court may seem meet (Rec., 29).

Kellogg filed a special and general demurrer to the bill Mch. 7, 1904 (Rec., 30).

A hearing was had on said demurrer and also on a rule *nisi* for an order to restrain *pendente lite* the Norfolk & Western Railway Company from transferring said 400 shares of its stock or paying dividends therefrom to said L. L. Kellogg, and at said hearing both parties offered evidence, after arguments heard the court on June 2, 1904, made an order overruling the demurrer of said Kellogg to the bill, and restraining the transfer of said 400 shares of stock *pendente lite*, and the paying out of dividends thereon *pendente lite* (Rec., 59 and 45).

Answer of Kellogg.

Kellogg filed an answer to the bill at March Rules 1904 (Rec., 32). The answer denies the frauds charged against Greene and the other defendants on information and belief, and knowledge on his part thereof. The answer states (Rec., 42):

> "That with reference to all the other items mentioned in said Exhibit 'F' save and except the Norfolk & Western stock defendant states and affirms: That the said Greene for his own convenience carried on a speculative account in the name of defendant with certain brokers in the City of New York, or elsewhere, and that with the assent of this defendant; and that the securities mentioned therein as having

been purchased were purchased on such speculative account or sold, and that defendant had never had them, nor had any interest in them, and has not them now in his possession, the same having been either bought or sold, as the case may be, without ever having been delivered into the possession of defendant, as he remembers it; but if he did have them, or any of them, he has long before the commencement of this suit turned them over to Greene or his order.

* * * * *

This defendant further says with reference to the said 400 shares of the Norfolk & Western stock mentioned in said bill:

That at the time of the arrest of said Benjamin D. Greene in December, 1899, he was held in the sum of $25,000;

That a friend and client of defendant one Leary, became surety on the bond for his appearance before the commissioner in the sum of $25,000 on defendant's giving to said Leary a written guarantee to hold him Leary, harmless from loss or damage by reason of his becoming surety for said Greene. That at about that time said Greene deposited with defendant some securities for the purpose of *indemnifying defendant* against loss by reason of his having indemnified said Leary, *with the understanding that at any time* he desired, he might withdraw *the securities so deposited and dispose of them, substituting others in their place.* That the securities so deposited were also to be held by the respondent to secure him for the fees and disbursements that might be incurred by him, or his firm, in defending said Greene, or in caring for his interests in any proceeding brought by the United States against him, in which said Greene was interested, pending in respondent's office.

That from time to time the securities so deposited were withdrawn by Greene and others substituted in their place, and that the Norfolk & Western stock, now in defendant's hands are securities that the defendant deposited or substituted in place of those originally deposited, and the respondent now avers

that he holds said Norfolk & Western stock as a *bona fide* holder, as security for the obligation that he is under to the said Leary by reason of the said Leary having gone upon another bond for the sum of $40,000 for Greene's appearance in the State of Georgia after the conclusion of the said removal proceedings, the agreement to indemnify Leary having been extended to cover said last mentioned bonds, and also to secure the payment to the respondent, and to his firm, of the various sums of money that he has advanced and for services rendered for said Greene in various matters since that time."

Certain Facts Stipulated.

The following appears from a stipulation of the parties intended to shorten the record on appeal (Rec., 60).

"(5) It is further stipulated that, thereafter a large amount of evidence was taken by complainant to sustain all the allegations of the bill, and the defendant L. L. Kellogg took evidence on his part. And the case was ready for hearing on its merits at the time, April 17, 1908, when the said Mary C. Leary, administratrix, presented her said petition to the said court for leave to intervene.

The said Kellogg whose deposition had been taken in his own behalf, did not take or offer any evidence to establish the contract of indemnity under which he claimed in his said affidavit (or answer) to be holding said 400 shares of Norfolk & Western Railway Company stock, nor did he take or offer any evidence to show that he or his firm had any claim on said stock for fees.

By the evidence offered at said hearing for injunction *pendente lite*, the complainants established sufficiently for the purposes of that hearing the fact that the 400 shares of the Common Stock of the Norfolk & Western Railway Company in controversy and which are described in Exhibit F to the bill, were purchased on March 26, 1900, by L. L. Kellogg in his

own name for account of Benjamin D. Greene, with part of the proceeds of 400 shares of stock of the Delaware, Lackawanna & Western Railway Company, 600 shares of the stock of the Canada Southern Railway Company and 100 shares of the stock of the Canada Southern Railway Company, sold by said L. L. Kellogg on March 23rd and March 26th, 1900, as described in Exhibit F. That the said 400 shares of stock of the Delaware, Lackawanna & Western Railway Company and the 700 shares of stock of the Canada Southern Railway Company had been purchased prior to December, 1899, by said Benjamin D. Greene, with money and proceeds thereof received by him as his share of the profits of the River and Harbor Contracts described in Exhibit E.

That the evidence taken on part of complainant for the trial of the merits of the cause, which established the same facts as above as against the then parties to the cause, was not controverted by any other evidence taken and said evidence was of file in the record of said cause prior to the presentation to the court of the petition of Mary C. Leary, administratrix, for leave to intervene.

The foregoing statement is to be taken as true for the purposes of this appeal, but it is not considered by either party that a consideration of the evidence for the trial of the case on the merits is necessary for this appeal and the same shall not be copied into the transcript for this appeal."

The Petition for Intervention of Mary C. Leary, Administratrix.

On April 18, 1908 (Rec., 46), at a time when the proceedings were in the stage stated in the foregoing stipulation, Mary C. Leary, administratrix of James D. Leary, deceased, filed her petition for leave to file the intervention attached to her petition. To this petition and proposed intervention the United States filed their ob-

jections by general and special demurrers (Rec., 54). After argument heard the court sustained the objections, and on July 20, 1908, denied the leave to intervene (Rec., 56).

The petition and proposed intervention, beyond giving the title of the case in which it was proposed to intervene, makes no reference to the allegations of the original bill in the cause either by way of recitation, by adoption or by denial other than in the 15th paragraph (Rec., 62), where it is averred:

> "That intervenor's claim upon and right to said securities is not liable to the claim of the plaintiff herein, *except* to the extent of any surplus remaining after making full indemnity to the intervenor."

Neither is there any reference in the petition or proposed intervention to the answer of L. L. Kellogg to the bill, which set up a totally different alleged contract of indemnity to that sought to be set up by Mary C. Leary, administratrix, nor were the averments of that answer adopted nor were they denied. The equity sought to be set up, in the proposed intervention, is a supposed equitable lien claimed to be based upon implication or upon an oral agreement or understanding on James D. Leary's part at the time, January 20, 1902, when Leary became bail for Greene on a recognizance taken in New York in the sum of $40,000 for Greene's appearance to answer to an indictment before the United States District Court in Georgia, that certain stocks were to be held by said Kellogg as Greene's attorney, so that said shares of capital stock should be applied by Kellogg in payment of the said obligation assumed by said Leary. Curiously enough, the pleader sets up an antecedent contract alleged to have been made between the parties in

1899, relative to a temporary bond for appearance before a Commissioner on which Leary was surety, and which was discharged long prior to 1902, and which has nothing to do with the merits of the case. It appears to have been lugged into the pleadings for the purpose of creating the presumption that the execution of the new bond by Leary in 1902 was done on the understanding that Leary should have similar indemnity to that alleged to have been contracted for and given him in 1899. The pleader, however, by setting out the terms of the defunct agreement of 1899, and not setting out the terms of the alleged understanding of 1902 on which she relies for the equities now asserted, otherwise than by averring that the terms of indemnity were to be the same as in the former contract, forces the court to consider the terms of the first contract, in order to arrive at the terms of the second alleged contract. It is also sought by the petition to tie the two transactions together for the purpose of making the alleged deposit by Greene of securities with Kellogg in December, 1899, to secure Leary as to the $25,000 recognizance, cover an understanding by Leary that those securities or substitutes for them should apply to the $40,000 recognizance given in January, 1902, at which time no change of possession or delivery of securities is alleged. Sufficient appears, however from the averments of the bill not denied and from the answer of Kellogg (Rec., 43) not controverted by the intervention to show that the $25,000 recognizance of December 11, 1899, referred to in the intervention was a temporary bond for appearance of Greene before the Commissioner in New York.

That bond became defunct prior to June 8, 1901, by the surrender of Greene by his bail.

Greene v. *Henkel,* 183 U. S., 255.

And therefore after June 8, 1901, Kellogg held the securities solely for Greene free from any equity of Leary in relation to the bond of 1899 even if there were originally such an equity.

That temporary bond was satisfied and discharged long prior to January 20, 1902. The very recognizance of January 20, 1902, on which the Leary intervention seeks relief recites (Rec., 49): That Greene was taken in custody on May 28, 1901, on the warrant of removal, and prosecuted a writ of habeas corpus thereafter to the Supreme Court of the United States, which was denied on January 6, 1902. So that whatever rights Leary had, if any, as to indemnity or trust in the stocks alleged to have been deposited with Kellogg in 1899 to secure Leary as bail under the recognizance of 1899 had been terminated over six months prior to the giving of the bail on January 20, 1902.

The only relevancy of the alleged defunct agreement as to the $25,000 recognizance of 1899 is in the effort made by petitioner to make the stock delivery alleged to have been made with Kellogg in 1899 or substitutes for it answer in place of a delivery at the time of the alleged understanding of January 20, 1902, in regard to which it is averred in the "Fifth" paragraph of the intervention as follows:

> "Fifth.—That thereupon said Benjamin D. Greene and his said attorney, Luther Laflin Kellogg, applied to the intervenor's intestate, James D. Leary, to become surety upon said bail bond of $40,000, which the said James D. Leary agreed to do upon the condition and understanding that the securities held in trust or on deposit *as heretofore alleged*, by the defendant Luther Laflin Kellogg, *should remain and continue* as security and indemnity to the said James

D. Leary for signing said bail bond of $40,000 for the appearance of said Greene in Georgia for trial upon said indictment."

And it is then averred:

"Sixth.—That upon such understanding and agreement the said James D. Leary, the intervenor's decedent, did on or about the 20th day of January, 1902, jointly with the defendant, Benjamin D. Greene, make, execute and deliver the recognizance of January 20, 1902."

In order to find out what the alleged understanding of January 20, 1902, was, we are forced by the pleader to see what the alleged defunct agreement of 1899 was, as it is averred that the new agreement was that the securities were to be held "in trust or deposit as heretofore alleged."

The preceding averments of the proposed intervention defining the terms of the alleged deposit under the defunct agreement of 1899, after referring to the arrest of Greene on December 11, 1899, and to the requirement by the commissioner of temporary bail, avers (Rec., 47):

"Third.—Thereupon the said Greene, *either* personally *or* through the mediation of the above-named defendant, Luther Laflin Kellogg, who was said defendant's attorney, applied to intervenor's decedent, James D. Leary, to become the bondsman of said Greene upon said bail bond, and said Leary consented to become such bondsman and did sign and execute a bail bond in the sum of $25,000, and the said Greene at the same time placed in the hands of his said attorney, Luther Laflin Kellogg, the defendant above named, as trustee and depositary to secure said Leary against any loss which he might sustain by reason of his becoming such bondsman, three hundred shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company, upon the condition and understanding that said

Kellogg should hold said shares of stock in trust for said Leary until said Leary was released from said bond, *or in case that said Leary's liability thereon should be established, that said shares of capital stock should be applied in payment of the obligations assumed by said Leary.*

Thereafter said shares of stock were withdrawn by said Greene from the custody of said Kellogg, and said Greene deposited with said Kellogg in lieu thereof four hundred (400) shares of the common stock of the Norfolk and Western Railway Company (being the shares referred to in the bill of complaint) to be held by said Kellogg upon the same terms and conditions as those upon which said Delaware, Lackawanna & Western stock was originally deposited with him."

The above averments of the petition are made relative to what took place under the defunct agreement averred to have been made in 1899. The right of withdrawal and substitution of securities was reserved in Greene by the terms of the original deposit of 1899. See answer of Kellogg (Rec., 43).

In the Ninth paragraph of the proposed intervention is recited the fact that Greene made default, on the $40,000 recognizance of January 20, 1902, and formal judgment of forfeiture was entered thereon March 7, 1902, in the United States District Court for the Southern District of Georgia, and execution was awarded thereon January 12, 1903.

It also avers that the United States brought suit against Mary C. Leary, administratrix, in the United States Circuit Court for the Southern District of New York, on said forfeited recognizance September 10, 1903, and judgment was entered against her in favor of the United States for $35,377.46 in said suit, "which judg-

ment has not been paid, set aside or reversed, and which said judgment the intervenor is therefore liable to be compelled to pay upon execution issued thereon," and it further averred that plaintiff is pressing the collection of said judgment.

It is then averred:

> "Fifteenth.—By reason of the premises the intervenor alleges that the defendant, Luther Laflin Kellogg, holds the securities mentioned in the bill of complaint herein, and the dividends thereon, as trustee or depositary for and for the benefit and protection of the intervenor, and that intervenor's claim upon and right to said securities is not liable to the claim of the plaintiff herein, except to the extent of any surplus remaining after making full indemnity to the intervenor."

The prayer is for such relief "as may be meet and equitable."

It is averred in the petition that James D. Leary departed this life intestate April 11, 1902, and Mary C. Leary was duly appointed administratrix April 21, 1902.

The Opinion of Judge McDowell in the Circuit Court.

Judge DeDowell held on demurrer (Rec., 56) that the petition was bad for the following reasons:

(1) That it is not clear that the pleader intended to set up more than an implied contract of Greene to indemnify Leary on the recognizance of January 20, 1902, and that the law will not imply such a contract in a criminal case.

(2) That even if the petition averred an express contract of the principal to indemnify bail in a criminal case,

the contract would be against public policy and not enforceable.

(3) That the intervention does not deny the allegations of the original bill that the stock in controversy was purchased with funds embezzled from the Government, nor does it allege that Leary at the time of the alleged agreement of indemnity, was innocent of knowledge of the facts which are alleged in the original bill, and which impress upon the stock a trust in favor of the Government.

No Offer in the Circuit Court to Amend.

Notwithstanding that the United States by demurrer and Judge McDowell in his opinion pointed out that the petition was fatally defective for failure to aver that Leary was a *bona fide* purchaser for value without notice, the intervenor made no offer to amend, nor did she file a new petition curing these and other patent defects, as she had a right to do. On the contrary she treated her pleadings as setting up her ultimate rights, and the denial of leave to intervene on those pleadings as a final decree, and appealed the same to the Circuit Court of Appeals.

Inasmuch as, there was danger that the fund would be distributed, the petitioner had the right to elect to treat the refusal to grant leave to intervene as a final decree, or she might have elected to present a new petition, curing all defects which she could cure and taken the denial on the new petition and appealed from that. But having elected to stand on her then pleadings, and appealed, it was too late to ask leave to amend in the appellate courts.

The Opinion of the Circuit Court of Appeals.

The judgment of the Circuit Court of Appeals affirmed the judgment of the court below in refusing to grant leave to the petitioner to intervene, and the opinion (Rec., 67) sustaining the judgment was placed on two grounds:

(1) That there were laches apparent on the face of the record on the part of the petitioner in not presenting her proposed intervention until April 17, 1908, whereas the original bill was filed December 19, 1903, and she had allowed the litigation to go on between the United States and the defendants until all the evidence was taken and the United States was in position to take its final decree, and no want of knowledge of what was going on, or other sufficient excuse is averred in the petition to explain the laches apparent on the face of the record.

(2) (Rec., 73.) She does not in her bill of intervention question that the United States was in truth and fact the equitable owner of the securities at the time she says her intestate bargained with Greene and Kellogg for an interest in them, and that she does not allege that her intestate was without knowledge or notice of the rights of the United States to them.

The Circuit Court of Appeals having found these reasons sufficient to sustain the judgment of the court below, avoided passing on other legal questions raised.

ARGUMENT.

THE PETITION WITHOUT JURISDICTIONAL MERIT, APPEAL FOR DELAY ONLY.

The petitioner was put on notice by the demurrer of the Government that the proposed intervention was totally defective in the following particulars:

That by the averments of the petition taken in connection with the pleadings and proceedings already in the cause:

(1) It appears that the property in controversy equitably belonged to the United States, from a time antecedent to the time when it is claimed in the proposed intervention that Leary acquired from Greene the rights in the property relied upon in the petition and that the petitioner failed to plead that Leary's rights had been acquired as a *bona fide* purchaser.

(2) That the proposed intervention, making the execution by Leary as surety, of the bail bond of January 20, 1902, the foundation of his alleged equities in the assets claimed under the contract with Greene, and setting out the bail bond, with its recitals, was an admission, taken in connection with the record of the cause, that probable cause of Greene's guilt of helping to embezzle over $2,000,000 of Government money had been legally found by a Commissioner and affirmed by the District Judge and by the Supreme Court (See *Greene* v. *Henkel*, 183 U. S., 249-254), and that Greene had obtained over $700,000 of it, and was an admission of constructive notice to Leary at the time of the alleged contract of Janu-

ary 20, 1902, that the assets then in Greene's hand were charged, as later shown in this cause, with a trust in favor of the United States, and that petitioner was bound to plead facts negativing the presumption that Leary was not put on inquiry and notice of the Government's rights in the said assets; and failing to so plead the petition was without merit.

(3) That the proposed intervention (Rec., 50) reciting the order of forfeiture entered on the recognizance March 7, 1902: That Leary died April 11, 1902, and Mary C. Leary qualified as administratrix April 21, 1902; that execution was awarded on the judgment in Georgia January, 1903; that suit on the forfeited recognizance was brought in New York September 10, 1903, and judgment was obtained against her in New York January 6, 1908; that the original bill to subject 400 shares of Norfolk & Western stock was brought by the United States against Kellogg, Greene and the Railway Company in the U. S. Circuit Court for the Western District of Virginia December 19, 1903; and it appearing that she did not present her petition until April 17, 1908, and that for five years she had allowed her alleged trustee Kellogg, to defend the suit on a different contention, as to the nature of the alleged indemnity contract, to that now contended for by her, and until the evidence was all taken, judgment by default taken against Greene, and the case ready for final decree, on a record in which Kellogg's defense was broken down (Rec., 60); and no averment being made that the petitioner had not been fully apprised of all these proceedings as and when they were in progress, and no facts being averred in the petition making a sufficient excuse for the failure of the intervenor to present

her intervention at an earlier stage of the proceedings; the petition should have been denied for gross laches.

(4) That the intervention as pleaded sets up as to the alleged "understanding" or agreement of January 20, 1902, on which petitioner relies for relief, only an implied contract of a principal to indemnify bail in a criminal case, and is void as against public policy, within the express terms of the case of *United States* v. *Ryder*, 110 U. S., 729.

(5) That the intervention if it can be construed to set up an express contract, sets up a contract by a principal to indemnify bail in a criminal case and is unenforceable because against the public policy of the United States, within the principles announced in *U. S.* v. *Ryder*, 110 U. S., 729.

(6) That it appearing from the averments of the intervention, that at the time of the alleged agreement of January 20, 1902, relied upon by the petitioner to create an equitable lien in the stocks in controversy, that said stocks were and had been for months held by and in the name of Kellogg for the sole benefit of Greene, and that there was no delivery or change of possession made at the time of the alleged agreement of Jan. 20, 1902, and it not being provided in the agreement that Leary should ever be given possession, but only that Kellogg should in the event of Leary's being held liable on the bond, apply the stocks to the payment of Leary's debt, and with the right reserved in Greene to withdraw said securities from Kellogg's possession and substitute others in their place. The facts pleaded do not create a legal or equitable lien on the stock in favor of Leary or constitute an

assignment of the fund even in equity and is within the rule laid down in:

Christmas v. *Russell,* 14 Wall., 70.
Trist v. *Child,* 21 Wall., 447.
Casey v. *Cavaroe,* 96 U. S., 467.
Third Nat. Bk. v. *Insurance Co.,* 193 U. S., 581.
Williams v. *Ingersoll,* 89 N. Y., 508.
Thomas v. *Ry.,* 139 N. Y., 163.

(7) If the pleader intended to plead an express rather than an implied contract of Greene to indemnify Leary as his bail, still no legal consideration is averred sufficient to support a contract. There being no legal obligation of the principal to indemnify bail in a criminal case, some consideration other than the mere execution of the bail bond must be pleaded to support an express contract.

Judge McDowell in his opinion filed July 20, 1908 (Rec., 56), held that the proposed intervention was bad, on the several points for the defects pointed out in (1), (2), (4), (5) and entered an order July 20, 1908, denying leave to file the intervention. He did not pass on the other points raised.

Denial of Leave to Intervene Not Ordinarily Appealable.

It is well settled that a refusal to grant leave to intervene is not ordinarily considered as finally adjudicating the rights of the parties on the merits. The petitioner may come back with a new petition or ancillary bill, curing defects of pleading and asserting rights not substantially asserted in the former petition. It is because of

this, that there is ordinarily no appeal from an order denying such leave.

The exception to the rule is "where a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated."

Credits Commutation Co. v. *U. S.*, 171 U. S., 311.

It was claimed by the petitioner Leary that her case was within the exception entitling her to appeal.

It is clear, however, that an intervenor in such a case in respect to an appeal stands in the same position as a complainant to whose bill a demurrer has been sustained, with leave to amend if desired or on failure to cure the defect within a time specified that the bill be dismissed. The petitioner, however, appealed from the order made on the petition as first presented, without attempting to amend or cure the defects, *and by so doing waived all right to amend* and made the adjudication of her rights in the subject matter of the petition final.

The Three Friends, 166 U. S., 1.

The Request Now for Leave to Amend.

It is urged by petitioner's counsel that there was no use asking leave of the Circuit Court to amend the petition as to all the defects the Judge had pointed out, other than the one as to the contract set up being against public policy, because the Judge in his opinion said that that was a defect not capable of amendment. But that expression was purely *obiter* since no amendment had been proposed by intervenor. The Judge's opinion logically invited amendment as to all other defects, and as well on

the point that as pleaded, the petition must be taken as only setting up an implied contract. If this court should be of the opinion that an express contract of the principal to indemnify bail was not against public policy, still it is not advised by any amendment offered to the petition in the trial court that it is within the power of the petitioner with the facts available to make the averment of an express contract, or to explain the apparent laches, or to make the averments of *bona fide* purchaser, necessary to give petitioner a standing in court.

There was certainly use in presenting to the Circuit Court of Appeals a case in which, if one of the grounds given by the Judge of the Circuit Court for denial of the petition be held not to have been well taken, the petition on its face would not show that there were other grounds of defect, which made the judgment of denial the only judgment which could properly be entered; and that could only be done by offering suitable amendments in the Circuit Court, or by presenting a new petition which made the proper allegations, and taking the denial on the new pleadings, and appealing from such denial. Where a complainant's bill showed laches on its face, this court said:

> "The order refusing him such leave (to amend) cannot be reviewed here if the record does not show what amendment he desired to make."
>
> *Nat. Bank* v. *Carpenter*, 101 U. S., 567.

It is strongly inferable from the 9th, 10th and 11th assignments of error of the appellant (Rec., 76) that the appeal to this court was taken for the sole purpose of having this court reverse the lower courts, by ordering the allowance of amendments to petitioner's pleadings, which would give her a chance to state a case in the trial

court, and without even now presenting by any pleading what those amendments would or could be.

If the scheme of procedure sought to be taken by appellant could prevail, a case might be taken up on appeal many times before actual final decree, and the Appellate Court would be undertaking to supervise *pendente lite* interlocutory orders which the law requires to be thrashed out in the lower courts.

This Court Without Jurisdiction to Allow the Amendments.

It is only by the election exercised by the proposed intervenor to waive the right to amend and to stand by the pleadings as the final assertion of her rights, that the order denying her leave to intervene could be treated as a final decree. And it is only by so treating her pleadings that appellate jurisdiction of the Circuit Court of Appeals and of this court could be invoked under the Acts of Congress.

This court is without jurisdiction to entertain an appeal, for the mere purpose of allowing amendments not offered in the trial court, where neither the pleadings nor evidence in the trial court states a case.

And where it is manifest from the pleadings that the intervenor plainly has no case without the allowance of such amendments, an appeal assigning as error only proper rulings on elementary principles, but whose main purpose is to obtain from this court directions for the allowance of amendments never presented to the trial court, should be treated as frivolous, and as an attempt to give this court colorable jurisdiction of a case made final in the Circuit Court of Appeals by the Act of Congress.

ELEMENTARY THAT FAILURE TO AVER BONA FIDE PURCHASER FATAL.

Mr. Justice Brown delivering the opinion of the Supreme Court in *Smith* v. *Gale,* said:

> "The intervention must be not only to protect the direct and immediate interest of the intervenor in a suit, but she is bound to make that interest appear by proper allegations in her petition (citing) *Coffey* v. *Greenfield,* 62 California, 602."
>
> *Smith* v. *Gale*, 144 U. S., 519.

The point decided in the Coffey case on which the Supreme Court cited it, in support of the broader proposition above announced, was that:

> "Where an intervenor claims to be an innocent purchaser without notice his pleadings will be insufficient unless it contains proper averments to that effect."
>
> *Coffey* v. *Greenfield,* 62 Cal., 602.
>
> 11 Ency. Pl. & Practice, p. 506.

Among other reasons which were enumerated by Thayer, Circuit Judge, justifying the court, on the averments of a petition for leave to intervene, in refusing such leave, are that:

> "It may be that the interest asserted by the intervenor, will be wholly unaffected by the proceedings which are liable to be taken in the pending case; *or that his rights, whatever they may be, are subordinate to the rights of the parties thereto.*"
>
> *Minot* v. *Mastin,* 37 C. C. A., 238; 95 F. R., 839.

> "An intervenor must set out his demand as clearly and explicitly as a plaintiff."
>
> *Clapp* v. *Phelps,* 19 La. Ann., 461.
>
> *Davis* v. *Sullivan,* 33 N. J. Eq., 569.

"A petition of intervention should exhibit all the material facts which are relied upon for the specific relief invoked."

Empire Dist. Co. v. *McNulta*, 77 F. R., 703.

"And the court must necessarily before granting leave determine whether there is any reasonable ground for believing that the petitioner has any substantial interest to be protected."

Buel v. *Farmers' L. & T. Co.*, 44 C. C. A., 277; 95 F. R., 839-842.

The pleadings in the original case as well as the state of the record, therefore required that the intervenor claiming a right to the securities alleged to have been acquired from Greene in January, 1902, should have either put in issue the existence of the frauds alleged in the bill, or that the securities had been purchased with the funds of the Government fraudulently diverted, or set up that Leary acquired the alleged right in the securities, as a *bona fide* purchaser for value without notice of the trust existing in favor of the Government.

The intervenor wholly failed to make any such averments.

On the contrary, the intervention clearly admits the Government's right to the stocks as against Greene and Kellogg, for in the 5th paragraph of the intervention (Rec., 52), it is averred:

"That intervenor's claim upon and right to said securities is not liable to the claim of the plaintiff herein except to the extent of any surplus remaining after making full indemnity to the intervenor."

It is not enough to say that Leary's claim is superior

to the Government's claim, for that is a mere conclusion to be drawn or not drawn from the facts well pleaded.

U. S. v. *Anken,* 90 U. S., 366.
Gould v. *R. R. Co.,* 91 U. S., 526.

FAILURE TO EXCUSE LACHES FATAL.

It is elementary that the failure of an intervenor to make proper averments excusing gross *laches* apparent on the face of an intervention, as in the case at bar, is fatal.

Landsdale v. *Smith,* 106 U. S., 391.
Smith v. *Gale,* 144 U. S., 509.
O'Brien v. *Wheelock,* 184 U. S., 450.
Buel v. *F. L. & T. Co.,* 44 C. C. A., 277.
Trust Co. v. *Toledo, etc., Ry.,* 82 F. R., 642.

THE DECREE OF AFFIRMANCE IN CIRCUIT COURT OF APPEALS.

Where the intervenor treated her pleadings as final, and appealed from the order denying leave to intervene, even though her petition was without equity, so that if she had not appealed, the adjudication would not have been final, yet it was proper for the Circuit Court of Appeals to affirm the order of denial, rather than dismiss her case for want of jurisdiction, because she had by election made the adjudication final.

It is proper to affirm in such a case.

Rothwell v. *Dewes,* 2 Black, 613.

CONCLUSION.

(1) The pleadings fail to state a case of merit, in so many ways dependent upon elementary principles, and no effort to amend in the trial court having been made after these errors were pointed out, the appeal to this court must be regarded as for delay only and as colorable, and for the purpose of having this court exercise a jurisdiction to allow amendments as in an appeal from interlocutory orders, of which this court has no jurisdiction.

(2) There is no merit in the petition on so many vital points turning on elementary principles, that an agreement with the contentions of the appellant on the few points that are possibly debatable would not change the result, and the attempt to invoke the jurisdiction of the Supreme Court should be regarded as frivolous and for delay only.

Respectfully submitted,

F. W. LEHMANN,
Solicitor General,

MARION ERWIN,
Special Asst. to the Atty. General.

November, 1911.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 508

MARY C. LEARY, ADMINISTRATRIX OF JAMES D. LEARY, DECEASED,

Appellant,

vs.

THE UNITED STATES.

REPLY BRIEF FOR THE UNITED STATES.

We do not think that it is necessary for a proper disposition of this case that this court should pass upon the public policy question, because the judgment of the Circuit Court of Appeals appealed from should be affirmed on simple elementary principles. However, since counsel for appellant's base their argument almost entirely upon the ground that Judge McDowell reached a wrong conclusion on that question, we insist that the judge was correct in regard to that ground of defect as well as in regard to the others, and submit this reply brief, confined to that subject.

THE CONTRACT OF INDEMNITY AGAINST PUBLIC POLICY.

Applying the principle that uncertain and ambiguous averments in pleadings must be construed most strongly against the pleader, we think that Judge McDowell was correct when he held that the averments of the Leary intervention as to the alleged contract of January 20, 1902, must be taken as asserting only an implied contract of a principal to indemnify bail in a criminal case. If so, the suit is fatally defective by the express ruling in

Ryder v. *United States,* 110 U. S., 729.

If, however, an express contract is averred, we think it is equally obnoxious to the principle of public policy asserted in that case and controlled by it.

> "For this would be to aid the bail to get rid of their obligation, and to relieve them from the motives to exert themselves in securing the appearance of the principal. Subrogation to the latter remedies would be clearly against public policy by subverting, so far as it might prove effectual, the very object and purpose of the recognizance."
>
> *Ryder* v. *United States,* 110 U. S., 737.

Under authority of that decision, Judge Benedict (in U. S. Circuit Court, Southern District of New York, September 1, 1891), held that an express contract of a principal to indemnify bail was against public policy and the contract void.

U. S. v. *Simmons,* 47 F. R., 577.

That was a decision in the very court in which the Greene bond of 1902 was given.

Judge Benedict also cites the ruling of Brett, Judge,

to the same effect in a case where the contract was express:

Herman v. *Jeunchner*, 16 Q. B. Div., 561.

We think that the history of the forfeiture of Greene's bond, his flight to Canada, and the utter indifference of Leary, his bail, to producing him in court, and the silence of the proposed Leary intervention as to any efforts made in that direction are eloquent in speaking for the public policy which would void such contracts.

While we may admit that there is a conflict of opinion on this question of public policy in the decisions of the few State courts which have passed on it, we think the result of the decisions of the State courts are summarized in the following from the Encyclopedia of Law:

> "In reference to a contract to indemnify a person on account of his becoming bail for a prisoner charged with a criminal offense the *best rule* would seem to be that such a contract is illegal, as against public policy when it is entered into by the prisoner himself, but valid and enforceable if persons other than the prisoner are the indemnificators."
>
> 16 A. & E. Ency. Law, p. 172.
>
> 3 A. & E. Ency. Law, p. 684.

In the case at bar it is not necessary to go beyond the principle that such a contract by the principal is against public policy, because that is the agreement sought to be set up here.

But whatever may be the public policy of particular States as to the administration of the criminal laws, the public policy of the United States as declared by the Federal Courts must control in the case at bar.

The New York State Rule.

Prior to the enactment of the "Cash Deposit Law," the public policy of New York was held to be against such indemnification of bail by the principal in a criminal case, but not against indemnification by third parties.

People v. *Ingersoll,* 14 Abb. Pr., N. S. (N. Y. Sup. Ct.), 23.

The provision for deposit of money in lieu of bail by defendants in bailable criminal cases was first enacted in the New York Code of 1881. It is found in the present New York Code of Criminal Procedure, Sec. 586, under the head of "Deposit Instead of Bail."

It was held that this legislation had changed the public policy of the State, so that a contract of a principal to indemnify bail was no longer against the public policy of a State:

> "The legislature has by its provisions provided that a personally responsible surety may be altogether omitted if the accused prefers to make a deposit of money. * * *
>
> It therefore cannot be said to be a part of the public policy of the State to insist upon personal liability of sureties."
>
> *Maloney* v. *Nelson,* 158 N. Y., 355.

It is contended by appellant that the public policy of the State of New York on the subject controls on the question of the valility of the alleged contract in the case at bar, whatever may be the rule applicable to Federal bail cases arising in other States.

It is generally true that the public policy of a State, with respect to contracts made within the State, and

sought to be enforced therein is obligatory on the Federal Courts, whether acting in equity or at law.

Missouri, etc., Co. v. *Kruning*, 172 U. S., 351.

But:

> "These views are not applicable to cases arising out of interstate commerce, *where the policy to be enforced is Federal.*"
>
> Idem.

Much less could they apply if contrary to the public policy of the United States, in respect to the means of enforcement of its criminal laws.

> "The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the Government officials; but when the lawmaking power speaks on a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."
>
> *U. S.* v. *Trans-Missouri F. Asso.*, 166 U. S., 290.

It is, however, contended, by appellant that the provisions of the 33rd section of the Judiciary Act (now Sec. 1014 R. S.), that for any crime or offense against the United States, the offender may "agreeably to the usual mode of process against offenders in the State in which he may be found, "be arrested and imprisoned or bailed," was an express adoption of the State laws which define and limit the obliagtion of bail, at the time bail is taken in such State.

The fallacy of that argument consists in confusing the "process" of taking bail, which 1014 R. S. assimilates to the usual process of the State, with the definition,

obligation, and limitations applicable to "bail," as required by the Federal Statutes to be taken.

The definition of bail in criminal cases at common law is:

> "Bail or bailing is the delivery of a person to his sureties upon their giving, together with himself sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail."
>
> 3 A. & E. Ency. Law, 2nd Ed., p. 653.
>
> 4 Black Com., 297, and authorities cited.

The provisions of Section 33 of the Judiciary Act of 1789 embodied in Section 1014 R. S., are peremptory that persons arrested for crimes against the United States are to be "imprisoned" or "bailed" agreeably to the usual mode of process against offenders in the State where the arrest is made.

The word "bail" there used was a well known common law term.

It is well settled that we go to the common law for our definitions of common law words, especially in matters of criminal procedure, and that in our criminal procedure in the Federal Courts we are controlled by the common law.

> *United States* v. *Reid,* 12 How., 366.
>
> *Logan* v. *United States,* 144 U. S., 301.

> "No statute is to be construed as altering the common law further than its words import."
>
> *Shaw* v. *Merchants N. Bank,* 101 U. S., 557.
>
> *Brown* v. *Barry,* 3 Dall., 365.

> "Where words in a statute have acquired a well understood meaning, through judicial interpretation,

it is to be presumed they were used in that sense in a subsequent statute on the same subject, unless the contrary appears."

The Abbotsford, 98 U. S., 440.

Minot v. *Mechanic's Bank*, 1 Pet., 46.

"In the construction of the laws of Congress the rules of the common law furnish the true guide."

Rice v. *Minn. R. R. Co.*, 1 Black, 358.

"If divers statutes relate to the same thing they ought all to be taken into consideration in construing any one of them."

U. S. v. *Freeman*, 3 How., 556.

U. S. v. *Babbit*, 1 Black, 55.

Harrington v. *United States*, 11 Wall., 356.

Ryan v. *Carter*, 93 U. S., 78.

"Where two acts of Congress are in *pari materia*, it will be presumed that if the same word be used in both, and a special meaning is given to it in the first act, it was intended it should receive the same interpretation in the latter act."

Reiche v. *Smythe*, 13 Wall., 162.

"It will not be inferred that the legislature in revising and consolidating the laws intended to change their policy, unless such intention be clearly expressed."

U. S. v. *Ryder*, 110 U. S., 729.

This was held in reference to the very subject we are now discussing.

Among the statutes in *pari materia* with Section 1014, R. S., are Sections 1018 and 1019, R. S., relating to the right of bail to arrest the principal and the surrender of persons charged with crime by their "bail" and the entry of *exonatur* upon the recognizance, etc.

There can be no doubt that the bail required by Section 1014, R. S., was common law bail, which gave the Government as pointed out in the Ryder case all the watchful care of a surety who was personally interested in having his principal in court.

Chief Justice Marshall in the Aaron Burr case, construing the provisions of the clause of the 33rd Section of the Judiciary Act (now Sec. 1014, R. S.) that:

> "For any crime or offense against the United States, an offender, may agreeably to the usual mode of process, against offenders in that state where he is found be arrested, imprisoned or bailed as the case may be."

Says:

> "I have ever construed this section to impose it as a duty on the magistrate who proceeds against any offender against the United States to 'commit' or 'bail' him."
>
> *U. S.* v. *Burr*, 25 Federal Cases, p. 189, case 14694.

The Federal Statute being peremptory that the defendant be imprisoned or "bailed," no law of a state, which forces a committing magistrate to accept a money deposit or other security of a different kind in lieu of bail can be effective in Federal cases, until Congress sees fit to adopt the new provisions, in no uncertain terms, especially in a matter of such vital importance as the enforcement of its criminal laws.

> "No law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases."
>
> *United States* v. *Ried*, 12 How., 366.

"For this would in effect place the criminal jurisprudence of one sovereignty under the control of another."

Logan v. *United States,* 144 U. S., 301.

It follows that the law of the state allowing the substitution of a different species of security in lieu of bail at the option of the defendant has no legal effect on Federal cases whatever. The magistrate in Federal cases must follow the state procedure for taking "bail," and not follow the state procedure for taking something else in lieu of bail not directed to be taken by the Federal statute.

The distinction is so clear that it needs no elaboration.

It is not to be presumed that Congress intended to change its policy on this subject unless such intent is clearly expressed.

U. S. v. *Ryder,* 110 U. S., 729.

Now, it is perfectly competent for the legislature of New York to adopt any new changes in the *manner* of taking bail in criminal cases, and under the provisions of Section 1014, R. S., of the United States, such new changes would be applicable to Federal cases. But no new law passed by the legislature of New York providing for a new species of security in lieu of bail in cases arising under the state laws, falls within the procedure for taking "bail," directed by Section 1014, R. S.

It follows that a change in the public policy of the State of New York as a result of a legislature enactment, which authorizes the principal to contract to indemnify his surety in criminal cases, and destroys the effective safeguards provided by the interested watchful-

ness of common bail, is in contravention of the public policy of the United States, and that the latter must prevail.

The rights, duties, obligations and limitations put upon "bail" in Federal criminal cases are controlled by common law or by Federal statute and are no part of the procedure of arrest and bailing, provided by Section 1014, R. S.

Appellant's counsel contend that it is the practice of commississioners to take money deposits in lieu of bail in Federal criminal cases in New York.

It is not shown by the record that such practice exists. If it has been done in exceptionable instances by a commissioner, that does not establish its propriety.

It may be that it was temporary security for appearance from day to day before a commissioner before probable cause of guilt was found, and what right the Government would have in such a deposit, if the defendant made default, has never been judicially passed upon. Undoubtedly our courts have assumed at times in exceptional cases, to allow persons charged with crime to be enlarged simply on their oral promise to return, or personal recognizance without any surety, and they have suspended sentences without imposing the penalty prescribed by law on persons convicted.

All such exceptional cases may be accounted for or justified on the broad discretion vested in the court, but where the nature of the charge is such that the court requires real common law bail to be given, and it is given, no loose practice can be a precedent for holding that the bail can contract with the principal to shirk the respon-

sibilities of bail as imposed by the Federal statute, or contract to destroy the effectiveness of the bail bond.

The authoritative pronouncement that such a contract of indemnitw is against the public policy of the United States applicable to bail taken in criminal cases in the very district in which intervenor's contract is set up, was made by Judge Benedict in the Simmons case, after the New York statute was enacted.

Respectfully submitted,

F. W. LEHMAN,
Solicitor General,
MARION ERWIN,
Special Asst. to Atty. Gen'l.

Supreme Court, U. S.
FILED.
DEC 8 1911
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1911.

No. 508.

MARY C. LEARY, Administratrix of JAMES D. LEARY, Deceased,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF COUNSEL FOR APPELLANT UPON MOTION OF THE UNITED STATES TO AFFIRM THE DECREE APPEALED FROM.

J. P. BELL COMPANY, PRINTERS, LYNCHBURG, VA.

In the Supreme Court of the United States

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BRIEF OF COUNSEL FOR APPELLANT UPON MOTION OF THE UNITED STATES TO AFFIRM THE DECREE APPEALED FROM.

The appellant, in opposition to the motion to affirm the decree appealed from, and in reply to the argument filed in support of said motion, submits the following statement and brief note of argument:

In September, 1899, in the District Court of the United States for the Southern District of Georgia, a bill of indictment was found against Benj. D. Greene and others charging them with conspiracy to defraud the United States (Rec. p. 46).

In December, 1899, the said Greene was arrested in the City of New York upon a warrant issued by a United States Commissioner based on the said indictment, and was held *to await a warrant of removal* (Rec. p. 47).

Thereupon the said Greene, personally, or through the mediation of Luther Laflin Kellogg, his attorney, appealed to James D. Leary to become the bail or bondsman of the said Greene in the sum of $25,000 and thus procure his temporary discharge from the custody of the officer. Leary consented to do so *on condition* that Greene would, contemporaneously with the execution of the bond, deposit with the said Kellogg certain shares of stock of the Delaware, Lackawanna & Western Railroad Company, to be held by the said Kellogg in trust to indemnify and save harmless the said Leary against any loss which he might suffer by reason of becoming the bondsman or surety of the said Greene.

With this understanding, Leary signed and executed the required bond, the said Kellogg and Greene both then and there agreeing that the said stock, the property of the said Greene and then in possession of the said Kellogg, should be held by the latter in trust for the indemnity of the said Leary.

Afterwards, it seems, that for and in place of the Delaware & Lackawanna stock certain shares of the stock of the Norfolk & Western Railway Company were substituted. The substituted shares of stock, still held by the said Kellogg as trustee, constitute the subject-matter of this litigation.

In May, 1901, a warrant for the removal of the said Greene to the State of Georgia for trial upon said indictment was issued, and he was taken in custody under the said *warrant of removal*, and subsequently was again let to bail, in the sum of $40,000, for *his appearance in Georgia* to answer the said indictment.

Thereupon the said Greene and Kellogg again applied to the said Leary to become surety for the said Greene—this time in the $40,000 bail bond. Leary agreed to do so, and did do

so, upon the condition and with the understanding that the securities held as aforesaid by the said Kellogg should remain and continue in the hands of the said Kellogg as security and indemnity to the said Leary against any loss he might suffer or sustain by reason of his becoming bound in the said $40,000 bail bond. The $40,000 bond was dated and executed on the 20th day of January, 1902, and a copy of it will be found in the record at pages 48 *et seq.*

The said Greene failing to appear in Georgia at the appointed time, it seems that an order was entered, in March, 1902, by the United States District Court for the Southern District of Georgia, that Greene's *"recognizance"* be forfeited, and that the United States recover against the said Greene and the said Leary the sum of $40,000, *unless* at the next term they should show cause why the said order should not be final.

Subsequently, on the 12th day of January, 1903, an order was entered declaring the aforesaid order final and awarding execution thereon. The summary order thus entered was, in all probability, without any process upon or notice to Leary, and intended only as record evidence, for use in any action that might thereafter be brought *on the bond*, of Greene's failure to appear.

In April, 1902, James D. Leary died, and the appellant, Mary C. Leary, was appointed and qualified as his personal representative.

Subsequently, the United States brought suit in the United States Circuit Court for the Southern District of New York against the said Mary C. Leary, as personal representative of the said James D. Leary, *upon the said $40,000 bond*, and in January, 1908, recovered a judgment for the sum of $35,377.46.

[At the time of the filing of the bill of intervention as hereinafter recited, the judgment aforesaid had not been paid.

While the record does not disclose the fact, counsel trust it is not improper to state, parenthetically, that, as they are informed and believe, the said judgment has since been satisfied].

The shares of Norfolk & Western stock, together with the accumulated dividends thereon, are not of sufficient value to pay the said judgment (Rec. p. 51).

In April, 1908, the appellant filed her petition for leave to intervene, and her bill of intervention, in the Circuit Court of the United States for the Western District of Virginia, in a chancery suit therein pending in which the United States of America was plaintiff and the said Greene and the said Kellogg, together with the Norfolk & Western Railway Company, were defendants—the object of her intervention being to set forth the foregoing state of facts and to obtain leave to assert her claim to the Norfolk & Western stock (claim to which was being asserted by the United States in the chancery suit aforesaid) and an opportunity to take proof in support thereof in order that the merits of her claim might be passed upon by the Court.

In the aforesaid chancery suit of *United States of America against Greene and others* the United States claimed that the Norfolk & Western stock aforesaid was purchased with funds arising from investments of money of which the United States had been defrauded by the said Greene and others, and certain testimony had been taken by the United States which it is conceded by a stipulation in this cause (Rec. p. 60) established the claim of the United States, *as against the parties to the suit*, sufficiently *for the purposes of a temporary injunction* restraining the said Kellogg from transferring the said stock *pendente lite* and restraining the payment of dividends thereon to him meanwhile.

In this connection it should not be overlooked that appellant was *not a party* to the suit of *United States* v. *Greene, et als.*, and that it does not appear that she was aware of the pendency

of the said suit for any length of time prior to the presentation of her bill of intervention.

Neither should it be overlooked that if it were proper to presume, in the absence of any showing, that appellant *did* know of the pendency of the said suit, then it must also be presumed that she knew that Kellogg, who stood in the relation of a trustee to the estate of her decedent, was a party to the suit, and that she had the right to assume that the interests of the estate of her decedent would be duly presented, pressed and protected by Kellogg.

Kellogg filed a demurrer to the bill of the United States, and also filed an affidavit in the nature of an answer to the averments of the bill (Rec. p. 30 *et seq.*).

By reference to the answer of Kellogg (Rec. pp. 33 to 44) it will be seen, however, that he averred that James D. Leary became surety on the $25,000 bond, hereinbefore mentioned, on *his (Kellogg's)* giving to said Leary a written guarantee to hold him harmless from loss or damage by reason of his becoming surety on the said bond, and that the securities were deposited with him (Kellogg) for the purpose of indemnifying *Kellogg* against loss by reason of *his* having agreed to indemnify said Leary, and that the securities were also to be held by him (Kellogg) to secure *himself* for fees and such disbursements as he might make in defending the said Greene or caring for his interests in any proceedings brought by the United States against him or in any other matters in which the said Greene might be interested, etc.; and that the securities originally deposited with Kellogg were withdrawn by Greene and the Norfolk & Western stock substituted in their place, and that he, the said Kellogg, held the Norfolk & Western stock as security for the obligation that *he* was under to appellant's decedent by reason of the latter's having become surety in the $40,000 bond aforesaid, conditioned *for the appearance* of Greene in the State of Georgia—the agreement on *his*

(Kellogg's) part to indemnify Leary having been extended, as Kellogg averred, to cover the last mentioned bond and also to secure the payment to him (Kellogg), or his firm, of various sums of money that he had advanced, and for services rendered for said Greene in various matters since that time (Rec. p. 43).

It will thus be seen that the position taken by the said Kellogg was such that, while it renders him personally liable to appellant as personal representative of her said decedent, to indemnify the latter's estate against the loss sustained by reason of the suretyship aforesaid, it was nevertheless *antagonistic* to appellant's rights, as she understood them, in respect to the shares of stock in question; and, there being no suggestion anywhere (except in the argument of counsel) that appellant or her decedent had any knowledge of the alleged facts upon which is based the claim that the securities in question were purchased with the funds arising from the investment of monies of which the United States had been defrauded by Greene and others, and in view of the further fact that Kellogg set up a claim *in himself* to the said securities, it follows that, even if appellant or her decedent *had* had any knowledge of the pendency of the suit aforesaid, it could not be imputed to them that they knew or suspected that Kellogg would take a position in the suit *antagonistic* to the interests of James D. Leary or his estate—a position which resulted not only in the failure to present appellant's claim (as she understood it) to the Court, but subordinated her claim to an antagonistic claim of his own. In other words, if appellant could be presumed to have had knowledge of the pendency of the suit of the United States, it would have to be presumed also that she supposed her interests would be represented and presented to the Court in their true aspect by the trustee who was before the Court.

To appellant's bill of intervention, the United States interposed several defences (Rec. p. 54) as follows:

First Defence Interposed by United States.

That the shares of stock in question were a trust fund belonging to the United States at the time of the accrual of appellant's claim thereto, and that appellant's right to intervene and set up an adverse claim had been cut off by the decree *pro confesso* taken against Greene.

The obvious reply to this defence is that appellant was *not a party* to the suit, either in person or by representation, and that Kellogg, who stood in the relation of trustee to her, did not present her claim to the Court, but, on the contrary, set up a claim *in himself* to the stock.

To the suggestion that appellant was represented by Greene and that a decree *pro confesso* against him was binding and conclusive upon her, it is deemed unnecessary to make any reply.

Second Defence Interposed by United States.

That appellant did not set up in her bill of intervention that she was a *bona fide* purchaser for value of the stocks in question.

A short and sufficient reply to this contention is, that appellant set up the fact that her decedent became surety on the condition, and in consequence of, the contemporaneous agreement upon the part of both Greene and Kellogg, that the securities in the hands of the latter should stand dedicated to and pledged for the indemnity of appellant's decedent, and, if appellant's decedent had known that the stocks pledged were purchased with funds arising from the investment of monies of which the United States were defrauded, he would have been *particeps fraudis*—indeed, *particeps criminis*—in every sense of the term.

Inasmuch as fraud and crime are never presumed, it can hardly be necessary for a plaintiff, in any case, to aver that he has not been guilty of fraud and is not a criminal.

The argument, that because the fact of Greene's indictment for a conspiracy to defraud the United States was known to Leary, therefore, the law imputed to him knowledge of the subsequently *alleged* fact that certain shares of stock belonging to Greene and in the hands of Kellogg were purchased with funds arising from the investment of monies of which the United States were defrauded, is so essentially unsound that it is not deemed necessary to answer it.

THIRD DEFENCE INTERPOSED BY UNITED STATES.

That the agreement that the shares of stock should be held for the indemnity of appellant's decedent is not alleged to be in writing.

There are several answers to this:

1. The plea of the statute of frauds, if it applied (as it does not), would be a defence *personal to Greene,* and could not be availed of by any other party;

2. The statute of frauds can not be relied on by a demurrer, but must be pleaded;

3. It is not necessary for a plaintiff in setting up an agreement in his bill to aver that the agreement is in writing, even if it be such as the law requires to be in writing. Unless it appear by the bill that the agreement is a parol agreement, demurrer does not lie;

4. The statute of frauds is a part of the law of evidence; it is not any part of the law of pleading, and does not alter the rules of pleading.

1 Bates Fed. Eq. Proc., §198.

FOURTH DEFENCE INTERPOSED BY UNITED STATES.

That appellant's intervention is in matter of form and substance without equity.

This defence is so vague and indefinite that it can not be dealt with.

FIFTH DEFENCE INTERPOSED BY UNITED STATES.

Laches of the appellant in presenting her petition.

Judgment was obtained against the appellant in New York, in January, 1908, and her bill of intervention was filed April 18th, 1908.

It is true that prior to 1908, informal proceedings to "forfeit the recognizance" were had in the District Court in Georgia, but, as already stated, these proceedings were, no doubt, without notice to the appellant, being intended only as record evidence, for use in any action that might be brought *on the bond*, of Greene's failure to appear.

As already pointed out, the appellant was *not a party* to the chancery suit brought by the United States against Greene and others.

There is nothing to show that she knew of its pendency.

If she had known of its pendency, it must be presumed that she relied upon Kellogg to present her case to the Court.

It must be presumed also that she intervened as soon as she found that he was setting up a claim to the stocks adverse to that of her decedent's estate.

In the brief filed by the appellee in support of the motion to dismiss, it is contended that this appeal is only for delay. A moment's reflection will suffice to dissipate this notion. The appellant has nothing to gain by delay—unless by delay is meant an opportunity to present her case fairly and fully to the Court and have it adjudicated upon its merits.

District Judge McDowell, while holding that the bill of intervention was defective in that it did not allege that Leary, at the time of the agreement to indemnify, was innocent of knowledge of the truth of the allegations subsequently embodied in the original bill, nevertheless held that the bill of intervention in this respect might have been amended (Rec. pp. 56-7).

If the allegations of the bill of the United States, that Greene and others had defrauded the United States of a large sum of

money, that the stolen monies had been invested, and that the stocks pledged for Leary's indemnity were purchased with funds arising from investment of the stolen money, were in fact true, *and if it had been alleged that Leary knew them to be true when he signed the bond* (which is nowhere alleged), then it would have devolved on his personal representative to deny the truth of the allegations. But surely it was unnecessary that the bill of intervention should *volunteer* the averment that the intervenor's decedent was not guilty of fraud and crime with which he was not even charged. Indeed, in the nature of things, it was *impossible* for Leary to have known the thousand and one *alleged* facts and circumstances which the United States subsequently set up as showing the alleged conspiracy to defraud.

Nevertheless, the Circuit Court having held that it was necessary to deny knowledge of the truth of these allegations, it must be presumed that they could easily, and would cheerfully, have been denied, *if opportunity had been allowed.* But Judge McDowell held (Rec. p. 58) that *the contract* between Greene and Leary, *"however pleaded,"* could not be other than illegal and unenforceable—upon the ground that a contract to indemnify a person, in order to induce him to become bail for a prisoner charged with a criminal offence, is contrary to public policy and void—and, *therefore,* dismissed the bill of intervention. Thus, opportunity to amend the bill in the matter of *mere form* was forestalled.

Judge McDowell also held that it was not clear from the bill whether the draftsman intended to set up an express agreement, or a "tacit" agreement that the securities were to be used to indemnify Leary.

We submit that his Honor labored under a plain misapprehension in this respect. The agreement set forth in the bill of intervention was necessarily an express agreement. It is impossible to conceive of such an agreement being implied or

"tacit." But he held that *this* objection to the bill could likewise have been amended, and this Court will entertain no doubt that this amendment also would have been made if opportunity had been afforded; but, as already pointed out, Judge McDowell, being of opinion that the contract between Greene and Leary, *"however pleaded,"* could not be other than illegal and unenforceable, dismissed the bill of intervention without any opportunity to amend.

> [It may not be improper to state in this connection that Judge McDowell's decree had been entered when appellant's counsel were apprised of his decision—a copy of the decree and of the opinion being mailed to them at the same time.]

The principal and only question in the case, namely, whether a contract to indemnify a person becoming bail for a prisoner is against public policy and void, was not decided by the Circuit Court of Appeals. It *was* decided by Judge McDowell in the Court of first instance, and *that was the question upon which the attention of the Court and the parties was concentrated in the Circuit Court.*

Hence appellant's counsel were taken by surprise when the Circuit Court of Appeals affirmed the decree of Judge McDowell, not upon the question upon which the attention of the Court and counsel was concentrated in the Circuit Court, but upon the ground of the laches of the intervenor (which Judge McDowell ignored), and upon the further ground that the appellant should, in her bill, have denied that her decedent knew, at the time he became Greene's surety, that the latter intended to fly to Canada, and that the securities in Kellogg's hands represented money fraudulently obtained from the United States—in other words, as already pointed out, should have denied that her decedent was guilty of fraud and crime with which he was never charged.

As pointed out in the tenth assignment of error, even if the bill of intervention be in fact obnoxious to the objections thereto as found by the Circuit Court of Appeals, and be defective in all the respects pointed out in the opinion of that Court, the Circuit Court of Appeals nevertheless erred in not remanding the cause with directions that opportunity be given appellant for such amendments as she might be advised to make, and the facts justified, in order to cure, if she could, the merely formal defects in her bill of intervention; because the Circuit Court forestalled, and in effect denied, application for leave to amend in these particulars, upon the ground that *the contract* set up in the bill was a void contract, however pleaded, and that any amendment of the bill of intervention would, therefore, be idle and vain.

The Circuit Court of Appeals dismissed the bill of intervention because of supposed defects which were merely technical and curable (if they were defects at all, as we maintain they were not) without allowing any opportunity to amend—errors which the Circuit Court held to be curable by amendment; errors, if errors at all, which this Court will not doubt for an instant could and would have been cured, but which the Circuit Court virtually refused to allow the intervenor to cure upon the ground that the contract set up in the bill of intervention was a void contract, however pleaded.

Thus the Circuit Court of Appeals, in effect, affirmed the decree of dismissal by *reversing* the Circuit Court in respect to the supposed *technical* defects in the bill of intervention.

This is not a matter calling for any technical rulings. All the intervenor asked was an opportunity to protect the very important rights that were in jeopardy. No one acting in her behalf was before the Court. Kellogg, the trustee, claimed title to the stocks himself. Greene had fled, and a decree *pro confesso* was taken against him. If, as Judge McDowell believed and held, the contract relied upon is void—if, in the

interest of public morality and policy, this contract can not be permitted to stand—that is a misfortune under which the intervenor will bow down without a murmur. But if the contract is not void—not outlawed—surely the Circuit Court of Appeals should have allowed her, as Judge McDowell would have done except for the fact that he deemed it idle and vain, to amend her bill and introduce her evidence.

But it is said that the Circuit Court of Appeals was *without jurisdiction* to allow the amendment. No authorities are cited to sustain this contention. To the contrary, this Court has held, not only that it may properly direct the allowance of an opportunity to amend when the cause of justice appears to require it, but has even considered and allowed amendments here.

The jurisdiction of this Court to allow amendments was fully sustained in *Kennedy* v. *Bank*, 8 Howard, 586. It said:

> "There is nothing in the nature of an appellate jurisdiction, proceeding according to the common law, which forbids the granting of amendments. And the thirty-second section of the Judiciary Act of 1789, allowing amendments, is sufficiently comprehensive to embrace causes of appellate, as well as original jurisdiction. But it has been the practice of this court, where amendments are necessary, to remand the cause to the Circuit Court for that purpose" (pp. 610-11).

In *Jones* v. *Meehan*, 175 U. S. 32, this Court held that an amendment of pleadings may be allowed *on appeal*, if justice appears to require it.

It said:

> "The question whether a supplemental answer should be allowed was a matter within the discretion of the court, largely depending upon the circumstances of the particular case. (Citing authorities.) The reasons for denying the motion in this case are not stated in the record. They

may have been the late stage of the case at which the motion was made, and a failure to satisfy the court that the facts now attempted to be set up were not known, or, at least, easily accessible, to the defendant or his solicitor long before. *But a. this court might, even now, if justice appeared to require it, allow an amendment of the pleadings, this part of the case may be more satisfactorily disposed of by considering what the effect of those facts would have been, had they been duly pleaded.*" (Our italics.)

In *Harding* v. *Boyd,* 113 U. S. 756, this Court said:

"In reference to amendments of equity pleadings, the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the Court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that *in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice.*" (Our italics.)

The Real Question.

This brings us to the real question in the case—the question upon which the attention of the Court and counsel was concentrated in the Circuit Court—namely, whether an express contract to indemnify a person on his becoming bail for a prisoner charged with crime is illegal and in violation of public policy.

The case principally relied on by the appellee is *United States* v. *Ryder,* 110 U. S. 729. Even a cursory examination of that case will disclose that it does not support the contention of the appellee. It does, indeed, hold that where a recognizance in a criminal case is forfeited and paid by the bail, there is no *implied* contract on the part of the criminal to refund the money to the bail; but it also holds, as we understand it, that an *express* contract to indemnify the bail in such case may be sustained.

In the bill of intervention in this case (the allegations of which must be taken as true on demurrer) an express contract was averred.

In *United States* v. *Ryder, supra,* the Court, distinguishing *Simpson* v. *Robert,* 35 Ga. 183, from the case before it, and apparently approving *Simpson* v. *Robert,* said:

> "The other case, *Simpson* v. *Robert,* was one in which the principal executed a mortgage to the bail to induce him to enter into the recognizance, and the mortgage was sustained by the court. This decision entirely accords with that of *Cripps* v. *Hartnoll.*"

The Federal Statute (U. S. Rev. St., Section 1014) is as follows:

> "For any crime or other offence against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of the circuit court to take bail, or by any . . . , mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence."

In *United States* v. *Rundlett,* 2 Curtis, 44, the Court said:

> "My opinion is that it was the intention of Congress by these words, 'agreeably to the usual mode of process against offenders in such State,' to assimilate all the proceedings for holding accused persons to answer before a court of the United States to the proceedings had for similar purposes by the laws of the State where the proceedings should take place," etc.

In *United States* v. *Ewing,* 140 U. S. 142, the Court, referring to Section 1014, Revised Statutes, said:

> "As this section requires proceedings to be taken 'agreeably to the usual mode of process against offenders in such State,' it is proper to look at the law of the State in which the services in such cases are rendered to determine what is necessary and proper to be done," etc.

In *United States* v. *Horton*, Federal Cases No. 15393, the Court said:

> "Congress has not seen fit to prescribe a uniform mode of its own in respect to preliminary proceedings against persons accused of a violation of its criminal enactments, but in the thirty-third section of the judiciary act it is provided that the procedure in such cases should be 'agreeably to the usual mode of process against offenders in such State'; that is, in the State in which the offenders may be arrested and the proceedings had. To this section we must resort to ascertain the powers of commissioners in respect to the arrest, imprisonment and bail of offenders against the laws of the United States."

In *United States* v. *Evans*, 2 Fed. 147, the Court said:

> "The Federal courts are bound, in this matter of taking bail in criminal cases, by the State laws, by express command of the statutes."

In *United States* v. *Case*, 8 Blatchford, 250, it was held that a United States commissioner in New York had no power to take a recognizance from day to day, because no New York statute allows it in the State courts.

Is has been definitely settled in the State of New York, where the contract between Leary and Greene was made, that a contract to indemnify a bail is not contrary to public policy.

Thus in *Maloney* v. *Nelson*, 144 N. Y. 189, Mr. Justice Peckham said:

> "This leaves it unnecessary to consider the other defences set up in the answer of the defendant Nelson,

> although we must say that the claim, that the defendant's contract to save the plaintiff harmless by reason of his entering into that bail bond was void as against public policy, does not impress us as being a good defence, at least in this State." (See 39 N. E. Rep. p. 84.)

And upon a second appeal in the same case, *Maloney* v. *Nelson*, 158 N. Y. 355; 53 N. E., p. 31, the Court of Appeals held that an agreement to indemnify the signer of a bail bond against loss by reason thereof is not against public policy.

> (It is worthy of note that Luther Laflin Kellogg was counsel in the last cited case for the prevailing party.)

In *Missouri, &c., Trust Co.* v. *Krumseig*, 172 U. S. 351, this Court held that the public policy of a State, with respect to contracts made within it and sought to be enforced therein, is obligatory upon the Federal courts whether acting in equity or at law.

Indeed, there is no national public policy in cases like the one under consideration. Congress has adopted the statutes, and therefore the policy, of the several States in reference to bailing persons charged with crime, and has assimilated all proceedings in such cases to the usual proceedings in the State in which the person is let to bail.

The question, as to the validity of a contract to indemnify a bail, is one of far-reaching importance. As this Court doubtless knows, it is common practice for indemnity companies to go security in bail bonds, for a consideration, and it seems to us that this Court would hardly be willing to dispose of so important a question upon a summary motion to affirm, in the consideration of which it is possible for counsel to lend the Court but little aid or assistance.

For one accused of crime to solicit bail, is not immoral. For an accused person to offer indemnity to another to become his bail, can hardly be illegal. And if, in consideration of

indemnity against loss or damage, a person should become the bail of another, in good faith and with no intention to aid the accused person in escaping the penalties of the law, we fail to see either immorality or illegality in the transaction. If a stranger in a strange land could not offer such indemnity, he would, in most cases, have no alternative but to submit to deprivation of his liberty without trial.

Respectfully submitted,

DAVID MCCLURE,
A. E. STRODE,
J. T. COLEMAN,
Solicitors for Appellant.

LEARY, ADMINISTRATRIX OF LEARY, *v.* UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 508. Argued April 29, 30, 1912.—Decided May 13, 1912.

In a suit brought by the United States to charge the defendant with a trust in respect to funds obtained by another through fraud against the United States, *held* that the personal representative of a third party claiming an interest in the funds under an agreement indemnifying him as bail of the party fraudulently procuring such funds was, under the circumstances of this case, entitled to intervene.

A contract that certain specific assets in the hands of a trustee should be held as security for a specific contingent claim is necessarily express, and is none the less so if conveyed by acts importing it than if stated in words.

Where the intervenor has not legal title and is not claiming against an admitted prior equity as a purchaser without notice, allegations of ignorance of facts not admitted and not finally established are not essential.

Bail no longer is the *mundium*, and distinctions between bail and suretyship are nearly effaced. *Quære;* whether a contract to indemnify bail which is legal by statute in New York where made is void as against the public policy of the United States.

In this case, as the intervenor did not know of the suit or the position taken by defendant, who was legally her trustee, she should not be held guilty of laches.

184 Fed. Rep. 433, 107 C. C. A. 27, reversed.

THE facts are stated in the opinion.

Mr. J. T. Coleman, with whom *Mr. David McClure* and *Mr. A. E. Strode* were on the brief, for appellant:

An express contract to indemnify a person on his becoming bail for a prisoner charged with crime is not illegal in violation of public policy. *United States* v. *Ryder*, 110 U. S. 729, distinguished. That case only holds that where a recognizance in a criminal case is forfeited and paid by the bail, there is no implied contract on the part of the criminal to refund the money to the bail; but it also holds that an express contract to indemnify the bail in such case may be sustained.

In the bill of intervention in this case an express contract was averred. See *Simpson* v. *Robert*, 35 Georgia, 183; Rev. Stat., § 1014; *United States* v. *Rundlett*, 2 Curtis, 44; *United States* v. *Ewing*, 140 U. S. 142; *United States* v. *Horton*, Fed. Cas. No. 15,393; *United States* v. *Evans*, 2 Fed. Rep. 147; *United States* v. *Case*, 8 Blatchf. 250.

In the State of New York, where the contract between Leary and Green was made, a contract to indemnify a bail is not contrary to public policy. *Maloney* v. *Nelson*, 144 N. Y. 189; *S. C.*, 158 N. Y. 355.

The public policy of a State, with respect to contracts made within it and sought to be enforced therein, is obligatory upon the Federal courts whether acting in equity or at law. *Missouri &c. Trust Co.* v. *Krumseig*, 172 U. S. 351.

Indeed, there is no national public policy in cases like the one under consideration. Congress has adopted the statutes, and therefore the policy, of the several States in reference to bailing persons charged with crime, and has

assimilated all proceedings in such cases to the usual proceeding in the State in which the person is let to bail.

For one accused of crime to solicit bail is not immoral. For an accused person to offer indemnity to another to become his bail can hardly be illegal. If a stranger in a strange land could not offer such indemnity, he would, in most cases, have no alternative but to submit to deprivation of his liberty without trial.

Mr. Marion Erwin, Special Assistant to the Attorney General, with whom *The Solicitor General* was on the brief, for the United States:

The petition is without jurisdictional merit, and the appeal is for delay only.

The property in controversy equitably belonged to the United States, from a time antecedent to when it is claimed that Leary acquired the rights in the property relied upon in the petition; the petitioner failed to plead that such rights had been acquired by a *bona fide* purchaser.

It appears from the averments of the intervention, that at the time of the alleged agreement of January 20, 1902, relied upon by the petitioner to create an equitable lien in the stocks in controversy, the stocks were and for months had been held by and in the name of Kellogg for the sole benefit of Greene, and that there was no delivery or change of possession, and it was not provided in the agreement that Leary should ever be given possession, but only that Kellogg should, in the event of Leary's being held liable on the bond, apply the stocks to the payment of Leary's debt, and with the right reserved in Greene to withdraw said securities from Kellogg's possession and substitute others in their place. The facts pleaded do not create a legal or equitable lien on the stock in favor of Leary or constitute an assignment of the fund even in equity. *Christmas* v. *Russell*, 14 Wall. 70; *Trist* v. *Child*, 21 Wall.

447; *Casey* v. *Cavaroe*, 96 U. S. 467; *Third Nat. Bk.* v. *Insurance Co.*, 193 U. S. 581; *Williams* v. *Ingersoll*, 89 N. Y. 508; *Thomas* v. *Railway*, 139 N. Y. 163.

A refusal to grant leave to intervene is not ordinarily considered as finally adjudicating the rights of the parties on the merits. The petitioner may come back with a new petition or ancillary bill, curing defects of pleading and asserting rights not substantially asserted in the former petition.

This case does not fall within the exception to the rule where a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. *Credits Commutation Co.* v. *United States*, 171 U. S. 311.

Petitioner appealed from the order made on the petition as first presented, without attempting to amend or cure the defects, and by so doing waived all right to amend and made the adjudication of her rights in the subject-matter of the petition final. *The Three Friends*, 166 U. S. 1.

The request to amend here comes too late. *Nat. Bank* v. *Carpenter*, 101 U. S. 567.

This court is without jurisdiction to allow the amendments, or to entertain an appeal, for the mere purpose of allowing amendments not offered in the trial court, where neither the pleadings nor evidence in the trial court states a case.

Failure to aver *bona fide* purchase is fatal. *Smith* v. *Gale*, 144 U. S. 519; *Coffey* v. *Greenfield*, 62 California, 602; 11 Ency. Pl. & Practice, 506; *Minot* v. *Mastin*, 37 C. C. A. 238, 95 Fed. Rep. 839.

An intervenor must set out his demand as clearly and explicitly as a plaintiff. *Clapp* v. *Phelps*, 19 La. Ann. 461; *Davis* v. *Sullivan*, 33 N. J. Eq. 569; *Empire Dist. Co.* v. *McNulta*, 77 Fed. Rep. 703; *Buel* v. *Farmers' L. & T. Co.*, 95 Fed. Rep. 839-842.

It is not enough to say that Leary's claim is superior to the Government's claim, for that is a mere conclusion to be drawn or not drawn from the facts well pleaded. *Gould* v. *R. R. Co.*, 91 U. S. 526.

The failure of an intervenor to make proper averments excusing gross laches apparent on the face of an intervention, as in the case at bar, is fatal. *Lansdale* v. *Smith*, 106 U. S. 391; *Smith* v. *Gale*, 144 U. S. 509; *O'Brien* v. *Wheelock*, 184 U. S. 450; *Buel* v. *F. L. & T. Co.*, 44 C. C. A. 277; *Trust Co.* v. *Toledo &c., Ry.*, 82 Fed. Rep. 642.

The contract as one of indemnity for bail was against public policy.

Uncertain and ambiguous averments in pleadings must be construed most strongly against the pleader. The alleged contract of January 20, 1902, must be taken as asserting only an implied contract of a principal to indemnify bail in a criminal case. If so, the suit is fatally defective. *Ryder* v. *United States*, 110 U. S. 729, 737; *United States* v. *Simmons*, 47 Fed. Rep. 577; *Herman* v. *Jeunchner*, 16 Q. B. Div. 561; 3 A. & E. Ency. Law, p. 684; 16 A. & E. Ency. Law, p. 172.

Whatever may be the public policy of particular States as to the administration of the criminal laws, the public policy of the United States as declared by the Federal courts must control in the case at bar.

Prior to the enactment of the "Cash Deposit Law," the public policy of New York was held to be against such indemnification of bail by the principal in a criminal case, but not against indemnification by third parties. *People* v. *Ingersoll*, 14 Abb. Pr. (N. S.) 23, but see New York Code Crim. Proc., § 586.

This legislation changed the public policy of the State, so that a contract of a principal to indemnify bail is no longer against the public policy of the State. *Maloney* v. *Nelson*, 158 N. Y. 355.

While it is generally true that the public policy of a State with respect to contracts made within the State and sought to be enforced therein is obligatory on the Federal courts, whether acting in equity or at law, these views are not applicable to cases arising out of interstate commerce, where the policy to be enforced is Federal. *Missouri &c. Co.* v. *Kruning*, 172 U. S. 351; *United States* v. *Trans-Missouri Asso.*, 166 U. S. 290.

The provisions of § 33 of the Judiciary Act, § 1014, Rev. Stat., relate to bail as known at common law.

This court goes to the common law for definitions of common-law words, especially in matters of criminal procedure, and criminal procedure in the Federal courts is controlled by the common law. *United States* v. *Reid*, 12 How. 366; *Logan* v. *United States*, 144 U. S. 301; *Shaw* v. *Merchants' N. Bank*, 101 U. S. 557; *Brown* v. *Barry*, 3 Dall. 365; *The Abbotsford*, 98 U. S. 440; *Minot* v. *Mechanics' Bank*, 1 Pet. 46.

In the construction of the laws of Congress the rules of the common law furnish the true guide. *Rice* v. *Minn. R. R. Co.*, 1 Black, 358; *United States* v. *Freeman*, 3 How. 556; *United States* v. *Babbit*, 1 Black, 55; *Harrington* v. *United States*, 11 Wall. 356; *Ryan* v. *Carter*, 93 U. S. 78; *Reiche* v. *Smythe*, 13 Wall. 162.

Among the statutes *in pari materia* with § 1014 are §§ 1018, 1019, Rev. Stat., relating to the right of bail to arrest the principal and the surrender of persons charged with crime by their "bail" and the entry of *exonatur* upon the recognizance, etc. *United States* v. *Burr*, Fed. Cas., No. 14,694.

No law of a State made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases. *United States* v. *Reid*, 12 How. 366; *Logan* v. *United States*, 144 U. S. 301.

The law of the State allowing the substitution of a different species of security in lieu of bail at the option of

the defendant has no legal effect on Federal cases. *United States* v. *Ryder*, 110 U. S. 729.

A change in the public policy of the State of New York as a result of a legislative enactment, which authorizes the principal to contract to indemnify his surety in criminal cases, and destroys the effective safeguards provided by the interested watchfulness of common bail, is in contravention of the public policy of the United States, and the latter must prevail.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for leave to intervene in a suit brought by the United States to charge the defendant Kellogg with a trust in respect of funds alleged to have been received by him from Greene and to have been obtained from the plaintiff by Greene through his participation in the well known Carter frauds. The funds specially referred to were certain shares of railroad stock standing in Kellogg's name but held in trust for Greene. The nature of the alleged frauds can be gathered from *United States* v. *Carter*, 217 U. S. 286. See *Greene* v. *Henkel*, 183 U. S. 249. The bill of intervention alleges the indictment of Greene and that the plaintiff's deceased became surety upon Greene's bail bond "upon the understanding and condition that the securities held in trust or on deposit" by Kellogg from Greene, being the above mentioned railroad stock, should remain in Kellogg's hands as security and indemnity to Leary for signing the bond. It goes on to allege Greene's failure to appear, a forfeiture of the bond, a suit upon it brought September 10, 1903, and a judgment for the United States against the intervenor on January 6, 1908. Finally the bill sets forth that the United States not only has got an injunction *pendente lite* forbidding Kellogg to deliver the fund to the intervenor to be used in partial liquidation of the judgment against her but is pressing the collection of the judgment;

and that the United States has no equity unless subject to that which the intervenor claims.

This suit was begun on December 19, 1903. The evidence had been taken and it was ready for final hearing when the petition for leave to intervene was filed, April 18, 1908. But the action on the bond seems to have been contested, and no judgment was entered until January 6, 1908, as we have said. The Circuit Court intimated an opinion that the bill of intervention was defective for want of an allegation that Leary, at the time of his agreement, did not know the facts alleged in the principal bill to raise a trust for the Government, and also that, so far as appears, it might be brought upon a supposed implied contract, whereas no such undertaking of indemnity would be implied by the law, citing *United States* v. *Ryder*, 110 U. S. 729. But observing that the petition might be amended in these respects, it held that amendment would be unavailing, as the contract was against public policy and void. 163 Fed. Rep. 442. The Circuit Court of Appeals, without deciding upon this last point, affirmed the decree on the above mentioned ground that Leary's knowledge was not negatived, and also on that of laches, apparent and unexplained. 184 Fed. Rep. 433. 107 C. C. A. 27.

The result is that the petitioner is denied her chance to be heard for want of amendments which the court that might have allowed them told her that it was no use to make as it was going to decide against her whatever she did. Even if the court would have allowed them, which is a speculation, it is holding a party to very technical rules to say that while one case was being dealt with below, he ought to have contemplated having to meet a different one above. But we need not consider that matter, as we are of opinion that the bill, without amendment, showed a sufficient right to intervene.

We lay on one side the suggestion that the intervention goes only upon an implied contract in its proper sense of

an obligation raised by the law irrespective of any real promise. That would seem to us a perverted interpretation of the words 'upon the understanding and condition' even if the contract were only a general one to indemnify, but a contract that certain specific stock in the hands of a trustee should be held as security for a specific contingent claim could not exist unless it was express. It would be none the less express if it was conveyed by acts importing it than if it was stated in words. The point that Leary's knowledge ought to have been denied impresses us hardly more. The plaintiff has not the legal title and is not claiming against an admitted prior equity as a purchaser without notice. Her position is that she does not know whether the United States has any equity or not, but that whatever rights the United States may have are inferior to hers. She is not called on to allege Leary's ignorance of facts that she does not admit and that are not yet finally established. We are of opinion that any one reading the bill in the same way that he would read an untechnical document would have no doubt that the plaintiff meant to put her case as we have taken it.

The only matters that seem to us to need argument are the questions of public policy and laches. As to the former the ground for declaring the contract invalid rests rather on tradition than on substantial realities of the present day. It is said that the bail contemplated by the Revised Statutes (§ 1014) is common-law bail and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail no longer is the *mundium*, although a trace of the old relation remains in the right to arrest. Rev. Stat., § 1018. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for $40,000, that sum was the

measure of the interest on anybody's part, and it did not matter to the Government what person ultimately felt the loss so long as it had the obligation it was content to take. The law of New York recognizes the validity of contracts like the one alleged, and without considering whether the law of New York controls we are content to say merely that the New York decisions strike us as founded in good sense. *Maloney* v. *Nelson*, 144 N. Y. 182, 189. *S. C.*, 158 N. Y. 351, 355.

As to laches, there is no legal presumption that the petitioner knew of this suit and still less that she knew the position taken by Kellogg. He set up that the stock was taken as indemnity to himself for his promise to indemnify Leary, &c., and said nothing about the petitioner's claim. If that claim is well founded and she knew of this suit, it was not laches in her to assume that Kellogg would do his duty as her trustee. She might be bound by a decree against him, but before decree on discovering his conduct she fairly may ask a chance to protect herself. Moreover as she disputed liability on the bond she had an additional reason for not moving until the case against her had gone to judgment. See *Anonymous*, 11 Mod. 2. On the whole matter it seems to us that she was dealt with too technically. She presents a case which unless read with an adverse mind is a good one on its face, and whatever misgivings we may entertain, we are of opinion that she ought to be allowed to try to prove it. In the circumstances it seems to us that the leave to intervene may be granted subject to the condition that the evidence already in shall be taken to be evidence against her subject to her right to recall and cross-examine such witnesses for the Government as she may be advised.

Decree reversed.

MR. JUSTICE MCKENNA and MR. JUSTICE PITNEY dissent.

END

OF

CASE